No. _____

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In The

Supreme Court of the United States

MICHAEL MASSEY and JOHN OTTEN, M.D.,

Petitioners,

vs.

DAVID HELMAN, Warden of the Federal Correctional Center in Pekin, Illinois in his Individual Capacity, FERDINAND SOMALIA, Health Services Administrator of the Federal Correctional Center in Pekin, Illinois in his Individual Capacity; MIGUEL GONZALEZ, Assistant Warden of the Federal Correctional Center in Pekin, Illinois in his Individual Capacity; and KENNETH MORIT SUGU, M.D., Medical Director of the Bureau of Prisons, United States Department of Justice, in his Individual and Official Capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the provision of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), precluding a prisoner's civil action respecting prison conditions until "such administrative remedies as are available are exhausted," require a prisoner claiming money damages exhaust administrative remedies pursuant to a prison grievance system expressly forbidding a money damages remedy?

2. Does a prison physician have standing to assert his inmate-patients' claims of deliberate indifference to inmate-patients' Eighth Amendment claims for reasonably necessary medical treatment deriving from prison policies and regulations requiring his withholding that treatment, and further foreclosing inmate-patients' First Amendment right of access to the courts for the prison's termination of the physician in retaliation for the physician's protesting and testifying about such prison policies and procedures?

3. May a federal prison physician terminated in retaliation for his protest and deposition testimony about prison policies forcing the physician to deny necessary medical treatment to his inmate patients invoke the district court's supplemental jurisdiction to vindicate his own First Amendment rights of speech and his inmate-patients' Eighth Amendment right to necessary medical treatment and their First Amendment right of access to the courts by injunctive and declaratory relief as a part of the inmate-patient's claim for money damages for denial of necessary medical treatment notwithstanding *Bush v. Lucas*'s holding that federal civil service employees are limited to their civil service remedies and have no right of action in federal court to vindicate their First Amendment rights?

LIST OF PARTIES TO THE PROCEEDING

The caption lists the parties to the action. They are all natural persons.

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I.

CITATION OF REPORTED OPINIONS

The court of appeals opinion is reported as *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999). The district court opinion is reported as *Massey v. Helman*, 35 F.Supp.2d 1110 (C.D.Ill. 1999).

II.

STATEMENT OF JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on November 2, 1999. A petition for rehearing en banc was filed with the court of appeals on December 17, 1999. This is within the 45 days allowed under Fed.R.App.Proc. 45(a) in actions involving officers of the United States. The panel corrected the decision on January 13, 2000. The court of appeals panel entered an order denying the petition for rehearing on March 1, 2000. This court has jurisdiction to review the judgment of the court of appeals by certiorari under 28 U.S.C. §§ 1254(1), 2101(c).

III.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant provisions are set forth in the Appendix. App. 52-58. Constitution of the United States, Amendment VIII; Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), Bureau of Prisons Regulations, 28 C.F.R. §§ 542.10-.16; Bureau of Prisons Program Statement; ¶ 1330.13. (Eff. Feb. 5, 1996).

IV.

STATEMENT OF THE CASE

A. Jurisdiction

1. The District Court

Plaintiff, Michael Massey, brought a *Bivens v. Six Unknown Agents*, 493 U.S. 388, 91 S.Ct. 1999 (1971) action against the named defendants, officers of the United States. He asserted deprivation of his rights under the Eighth Amendment to the Constitution. The district court had jurisdiction under 28 U.S.C. § 1331. Plaintiff, John Otten, M.D. was a staff physician at the Federal Correctional Center in Pekin, Illinois ("FCI-Pekin") who was terminated after protesting and testifying about the policies Massey alleged to be unconstitutional. He joined Massey's action to assert *Bivens* claims for deprivation of his inmate-patients' Eighth and First Amendment rights and his own First Amendment rights. The district court had jurisdiction to hear Dr. Otten's claim under 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a). The district court granted defendants' Rule 12(b)(1) motion to dismiss in a February 2, 1999 order. 154. Judgment dismissing Massey's claims without prejudice for failure to allege exhaustion of administrative remedies and Dr. Otten's claims for lack of jurisdiction and standing was entered on February 2, 1999. 155; App. 32-51.[1]

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[1] Record references are to the district court docket number followed by its page number. For example, reference to 154-1 is to docket number 154, page 1. References to the complaint include the Count, Part, ¶ number, and page number. The documents indicated in the Appendix to this petition are

2. The Court of Appeals

Plaintiffs filed a notice of appeal on February 23, 1999. 157. The court of appeals had jurisdiction under 28 U.S.C. § 1291. App. 9-10, n. 3.

B. Nature of the Action

This action was originally brought on November 7, 1997 by Michael Massey, an inmate at the Federal Correctional Center in Pekin, Illinois ("FCI-Pekin"). He asserted individual and class claims seeking money damages and an injunction for deprivation of the Eighth Amendment right to necessary medical care. 1. The district court ordered that the deposition of John Otten, M.D., the FCI-Pekin physician proceed immediately. December 23, 1997 Minute Order. Dr. Otten was suspended the day before the first session of his deposition was scheduled and then discharged. 118-Count II, Part III, ¶¶ 28-29, p. 32. He joined the action to assert individual and class claims for his retaliatory discharge. 118-Count II, Part I, ¶ 3, pp. 21-22. The district court entered a July 8, 1998 order denying class certification on papers without an evidentiary hearing. 99, 100, 117, 122, 124, 125, 127. Defendants filed a Rule 12(b)(1) motion to dismiss Massey's claims in the fourth amended complaint for lack of jurisdiction for failure to exhaust administrative remedies and Dr. Otten's claims for lack of jurisdiction and standing. 129. The district court granted that motion in a February 2, 1999 order. 154; App. 32-51. The appeal then proceeded.

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referred to as "App. ___" designating the Appendix and the relevant page number.

C. Statement of Facts and Proceedings in District Court

1. Initial Proceedings

Class certification was denied but the proceedings provide background facts of record. Massey came into this litigation knowing only that Dr. Otten said his hernia needed surgery and nothing was being done. 1-Part IV, p. 5-7. His Indianapolis attorney had written Warden Helman on July 19, 1996 asking what was being done about Massey's hernia. 112-Doc. No. 1. No reply was made to Massey or the attorney. 112-Doc. No. 1, Doc. 3.

Massey retained trial counsel and filed this action on November 7, 1997. 1. His complaint alleged that he had a hernia for which Dr. Otten had ordered surgery and none was forthcoming. 1-Part II, ¶¶ 8-14, pp. 3-4. He claimed this was a denial of necessary medical care occasioned by policies of deliberate indifference adhered to by Health Services Director Somalia and Warden Helman. 1-Part IV A, ¶¶ 15-17, p. 6. Massey's counsel learned at a December 23, 1997 discovery motion hearing from defense counsel that on August 7, 1996 Dr. Otten had ordered that an outside surgeon perform surgery on Massey's hernia. Health Services Administrator Somalia canceled that order on August 27, 1996. 52-12. Massey's surgery was not performed until January 28, 1998. 118-Count I, Part IV B, ¶ 28, p. 12.

Massey's counsel conducted six sessions of the deposition of Dr. Otten. 122-6. He then learned of the policies

in the Health Service Manual claimed to be unconstitutional and the FCI-Pekin policies that are claimed unconstitutional. 122-3-7; 118-Count II, Part III, ¶ 25, p. 31. He amended his complaint to contain the allegations that were the subject of the appeal. 83, 118.

2. The Fourth Amended Complaint

Massey asserted *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971) claims against the Medical Director of the Bureau of Prison, Dr. Morit Sugu, and three officials of FCI-Pekin, Warden Helman, Health Services Administrator Somalia, and Assistant Warden Gonzales. 118-Count I, Part I, ¶¶ 2-6, pp. 2-3. Massey alleges that he and others have been denied their Eighth Amendment right to receive medical care necessary to treat their serious medical needs. 118-Count I, Part IV A, ¶¶ 25-27; Part IV B, ¶¶ 28-29, pp. 12-13. Massey complains of three policies in the Health Services Manual of the Bureau of Prisons that played a causative role in the refusal the defendant FCI-Pekin officials to allow the surgical repair of Massey's hernia that had been ordered by the prison physician, John Otten, M.D. 118-Count I, Part II, ¶¶ 8-12, pp. 3-4. On August 7, 1996 the date Dr. Otten ordered a surgical referral, the hernia could have been surgically repaired with local anesthesia. 118-Count I, Part II, ¶¶ 8-12, pp. 3-4; Part V A ¶ 36, pp. 15-16. The hernia expanded to six inches in diameter during the delay from the August 7, 1996 order that was canceled on August 27, 1996 by Health Services Administrator Somalia to January 28, 1998, the date when the surgery was performed. *Id.* Massey required surgery under a general anesthesia with a longer recovery and

greater risk of recurrence of the hernia and endured considerable pain and disability in the 17 month delay in obtaining the surgery. *Id.*

The policies Massey complained of are: (1) a policy of the Medical Director, Dr. Morit Sugu, prohibiting surgical repair of routine hernias, 118-Count I, Part III A, ¶¶ 17, Ex. 6, ¶ 18, pp. 7-8; (2) the policy providing that the Medical Director of the entire Bureau of Prisons is the only person that can approve such a procedure, 118-Count I, Part III A, ¶ 17, Ex. 6, ¶ 18, pp. 7-8; and (3) the policy at FCI-Pekin providing that the prison physicians have no control over authorization of medical treatment they have ordered to be performed by consulting physicians. 118-Count I, Part III B, ¶¶ 19-24, pp. 8-11. Each of these policies are contrary to the accepted standard of medical care. 118-Count I, Part III A, ¶ 18 a & b, pp. 7-9; Part III B, ¶ 19, p. 8. The defendant, Dr. Morit Sugu, prepared, implemented, and applied the Bureau of Prisons policy with deliberate indifference of the risk that inmates would be denied necessary medical care. 118-Count I, Part III A, ¶ 15; IV B, 2, ¶ 28, p. 12. The defendant, Health Services Administrator Somalia, a non-physician, regularly overruled or unreasonably delayed physician orders for consultations with deliberate indifference to the denial of necessary medical care to inmates that was occurring. 118-Count I, Part III B, ¶ 19, p. 8; Part IV A, ¶¶ 25-26, Part IV B 2, ¶ 29, pp. 12-13. The defendants, Warden Helman and Assistant Warden Gonzales, had actual knowledge of the policy and acquiesced, encouraged, and approved Somalia's conduct with deliberate indifference to the risk that inmates would be denied necessary medical care. 118-Count I, Part III B,

¶¶ 19-24, pp. 8-11; Part IV A, ¶¶ 25-27, pp. 11-12; Part IV B 2, ¶ 29, pp. 12-13. The policies and the defendants' deliberate indifference were a cause of the delay of Massey's surgery. 118-Count I, Part V, A ¶ 36, pp. 15-16.

Massey sought an award of damages for the personal injuries caused by deprivations of his constitutional right to receive necessary medical treatment. 118-Count I, Part V, A ¶ 36, pp. 15-16; Part VII, ¶¶ 6 & 7. The injunctive relief he sought was phrased in terms of the class relief. 118-Count I, Part VI ¶¶ 40-42; Part VII, ¶¶ 1-5.

Dr. Otten is a 74 year old board certified general surgeon. He took the staff physician position at FCI-Pekin when he retired from his general surgery practice due to his age. 118-Count II-Part I, ¶ 2, p. 21. Dr. Otten testified at six sessions of his court ordered deposition. 118-Count II, ¶ 25-26, p. 31. During the deposition, he identified the policies of FCI-Pekin and the Health Services Manual of the Bureau of Prisons that prevented him from delivering the medical care to serious medical conditions of inmates required by the accepted standard of medical care. *Id.* Dr. Otten also identified those inmates who had been denied medical treatment of serious medical conditions required by the accepted standard of medical care pursuant to the policies of FCI-Pekin and the Health Services Manual of the Bureau of Prisons. 118-Count II, Part III, ¶¶ 22-25, pp. 30-32.

Dr. Otten's deposition testimony was not the first time he had protested the denial of medical care to inmates. He regularly protested when Administrator Somalia overruled his orders and in other instances when inmates were denied the medical attention required by

the accepted standard of medical care. 118-Count II, Part III, ¶ 23-24, 26 p. 31. Health Administrator Somalia, Assistant Warden Gonzales and Warden Helman were each aware of these protests. *Id*. Yet they did nothing to alter the unconstitutional policy existing at FCI-Pekin which allowed non-physicians to determine the medical care received by inmates. *Id*. Nor did they take any steps to alter the unconstitutional policies contained in the Health Services Manual. *Id*.

Dr. Otten's protests confirmed the allegations of this lawsuit, a fact known to defendants. *Id*. They knew that Dr. Otten would truthfully testify about deficiencies in medical care at FCI-Pekin and defendants' deliberate indifference in the Massey action. 118-Count II, Part III, ¶ 27, p. 31. On December 12, 1997, Assistant Warden Gonzales suspended Dr. Otten for two days on false charges. *Id*. On January 20, 1998, the day before Dr. Otten was to testify at the first session of his deposition in the *Massey* action, Assistant Warden Gonzales placed him on home duty pending a review of charges that he delivered inadequate medical care to his inmate-patients. 118-Count II, Part III, ¶ 28-30. Gonzales – a non-physician – recommended that Dr. Otten's employment be terminated based on the charges of inadequate medical care. *Id*. Those charges were reviewed by Warden Helman, another non-physician. *Id*. Neither Assistant Warden Gonzales nor Warden Helman consulted a physician on the question of the validity of the charges of inadequate medical care. *Id*. On February 26, 1998, Warden Helman discharged Dr. Otten from his employment as a staff physician at FCI-Pekin. 118-Count II, Part III, ¶¶ 28-31, p. 30. A-1. Dr. Otten claims this was done in retaliation for

his insistence that his inmate-patients receive the necessary medical care and his own protest and testimony about the Bureau of Prisons and FCI-Pekin policies. 118-Count II, Part III, ¶ 31.

Dr. Otten joined Massey's action to assert the deprivation of the constitutional rights of his inmate-patients, which has also caused him injury. 118-Count II, Part I, ¶ 3, Part IV A-C, ¶¶ 32-39, pp. 33-35. Dr. Otten alleges that he was discharged in furtherance of the unconstitutional policies of depriving inmates of their right to receive the medical care required by the accepted standard of medical care and preventing him as prison physician from delivering that medical care to his inmate-patients. 118-Count II, Part III, ¶ 31, p. 32. He bases his claim on the following constitutional rights:

1. His inmate-patients' Eighth Amendment right to receive the medical attention required by the accepted standard of medical care to treat serious medical conditions that the inmate-patients develop. 118-Count II, Part IV A, ¶ 33, p. 33.

2. His inmate-patients' right of access to the courts guaranteed by the right to petition of the First Amendment. 118 Count II, Part IV B, ¶¶ 34-35, p. 34.

3. His own First Amendment right to speak freely on issues of public concern. 118-Count II, part IV A, ¶ 33, p. 33.

Dr. Otten sought an injunction against enforcement of the Bureau of Prisons and FCI-Pekin policies, reinstatement to his position with back pay and benefits, and injunction against future employment action for alleged

medical deficiencies that are not based upon the opinion of a physician. 118-Count II, Part VII, ¶¶ 3-7, pp. 39-40.

3. The Defendants' Rule 12(b)(1) Motion to Dismiss, Plaintiffs' Motion for Discovery, and Massey's Motion for Leave to Amend Complaint to Dismiss Injunction Claim

Defendants' Rule 12(b)(1) motion to dismiss contended that there were administrative remedies available in the Bureau of Prisons under 28 C.F.R. § 542.10 and plaintiff had not pursued those remedies. 129. Plaintiff filed a motion asking for discovery on the factual matters raised in defendants' motion. 137, 139. The defendants agreed in their response that plaintiff was entitled to that discovery. 140. Massey filed a motion for leave to amend his complaint to dismiss the injunction claims and to proceed only on the damage claims. 135.

4. The February 2, 1999 Order and Judgment of the District Court

The district court ruled on the pending motions in a February 2, 1999 order. 154; App. 32-50. It held Massey's claims must be dismissed because he did not allege exhaustion of available administrative remedies under the Prison Litigation Reform Act. 154-10-12; App. 39. The court noted, but did not decide, the question of whether the Prison Litigation Reform Act was jurisdictional or a threshold requirement akin to a statute of limitations. 154-10; App. 39. It rejected Massey's contention that exhaustion was not required because the Bureau of

Prisons did not have the authority to award money damages on a *Bivens* claim. 154-6, 9; App. 37-39. The court misconstrued the motion to amend the complaint as attempting to assert a damage remedy that was not in the complaint. 154-24-25; App. 49. It denied the motion as futile because of the ruling that a prisoner must plead exhaustion in his complaint. 154-24-25; App. 49.

The court construed Dr. Otten's claim as an attempt of a federal civil service employee to avoid the comprehensive remedial scheme provided by Congress for resolution before the Merit Systems Protection Board. 154-13-16; App. 41-44. It rejected Dr. Otten's claim that the Merit Systems Protection Board could not provide complete relief. 154-16; App. 43. The court ruled that since Dr. Otten had been discharged, he had no standing to challenge the Bureau of Prisons and FCI-Pekin policies denying necessary medical care to inmate-patients. 154-21; App. 46-47. It noted Dr. Otten's contention that supplemental jurisdiction under 28 U.S.C. § 1367(a) existed over his claims due to their relationship to Massey's claims and denied it because no case was cited to support it. 154-18 n. 6; App. 44.

The district court held physicians have standing to assert the rights of their patients only in situations akin to the patient's decision to have an abortion. 154-19-21; App. 45-47. It ruled that these circumstances were not similar. 154-19-20; App. 45-47. It found the obstacles prisoners face in asserting the claims for denial of necessary medical care do not compare to those of the patient who desires an abortion. The court held that Dr. Otten lacked standing to assert the deprivations of the rights of his inmate-patients. 154-20-21; App. 46-47.

The district court's February 2, 1999 order and judgment dismissed Massey's claims in Count I without prejudice for failure to allege exhaustion of administrative remedies. 155. It dismissed Dr. Otten's claims in Count II with prejudice for lack of jurisdiction and lack of standing. 155; App. 50.

D. The Court of Appeals' Decision

The court held the Prison Litigation Reform Act is a threshold requirement akin to a statute of limitations that did not oust the federal courts of jurisdiction. App. 9 citing *Perez v. Wisconsin Department of Corrections*, 182 F.3d 532 (7th Cir. 1999). Failure to exhaust is an affirmative defense that the defendant must assert in its answer or in a Rule 12(b)(6) motion. App. 15.

The court rejected Massey's argument that the Act did not require exhaustion because the Bureau of Prison's lack of authority to award money damages administratively left him with no "available" administrative remedy. App. 10 citing *Perez, id.* So long as there is an administrative scheme, it must be exhausted even if the prison has no authority to award money damages. App. 11 citing *Alexander v. Hawk*, 159 F.3d 1321, 1327 (11th Cir. 1998).

Massey contended that no administrative remedy existed to correct the systemic deficiencies in medical care alleged. Under the Bureau of Prisons regulations, only the Medical Director could grant exceptions to the Health Service Manual prohibition against surgical repair

of hernias. The grievance procedure claimed to be a remedy was directed to the FCI-Pekin staff, its Warden, the BOP Regional Director, and its general counsel. 28 C.F.R. §§ 542.10-542.19; App. 12. The court found this interpretation to be "hypertechnical" questioning the "effectiveness" rather than the "availability" of the remedy. If there is a prison internal grievance procedure, the Prison Litigation Reform Act requires exhaustion, no matter what its limits. App. 12-13 relying upon *Alexander v. Hawk*, 159 F.3d at 1326-27.

The court recognized that a prisoner who complains of a delay in medical treatment ultimately received need not exhaust the prison grievance procedure. App. 13-14 citing *Perez*, 182 F.3d at 538. Massey did not come within that exception because he filed the action on November 9, 1997 and his surgery was not received until January 28, 1998. App. 14.

The district court's dismissal of Dr. Otten's own claim for First Amendment retaliation for lack of jurisdiction because of the existence of his Civil Service Reform Act remedies was erroneous. *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404 (1983) held the federal courts had jurisdiction to hear claims to vindicate deprivations of constitutional rights by federal actors. However, it found the existence of administrative remedies under the Civil Service Reform Act precluded any substantive right of action in the federal courts. The dismissal was affirmed as a dismissal for failure to state a claim under Fed.R.Civ.Proc. 12(b)(6). App. 22-24.

Dr. Otten's claims for deprivation of his inmate-patients' First Amendment right of access to the courts

and denial of necessary medical treatment raised the question of standing. The court held there was no deprivation of the inmate-patient's right of access to the courts because he testified in the sessions of his deposition while under suspension and after his termination. App. 27.

Since Dr. Otten had no rights under the Eighth Amendment, he had no personal stake in the outcome of his inmate-patients' Eighth Amendment right to necessary medical care. App. 27. The physicians in *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868 (1976) had a pecuniary interest in the deprivation of their indigent patients' right to receive publicly funded abortion. Dr. Otten – who has no pecuniary interest in his inmate-patients' treatment – presented no case or controversy. App. 27.

Additionally, the court found that prudential considerations make standing improper. Unlike the physicians in *Singleton*, Dr. Otten, who was terminated from the FCI-Pekin staff, did not have an ongoing relationship with his patients. The denial of various types of necessary medical care alleged by Dr. Otten was unlike the sensitive decision on abortion. There were also no obstacles to assertion of the prisoners' rights themselves that are present in the abortion decision. App. 30-31.

V.

ARGUMENT

I.

Question No. 1

Michael Massey's Claims

A. There is a Conflict Between the Seventh Circuit's Intermediate Reading of the Prison Litigation Reform Act Requirement of Exhaustion, the Reading of the Tenth, Ninth, and Fifth Circuits That Exhaustion of Money Damage Claims is Not Required When the Prison has no Authority to Award Money Damages, and the Reading of the Eleventh, Sixth, and Third Circuits that Exhaustion of Money Damage Claims is Required Even When the Prison has no Authority to Award Money Damages

The Prison Litigation Reform Act provides that no action shall be brought with respect to prison conditions by a prisoner "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The statute was effective on April 26, 1996. Pub.L. 104-134, 110 Stat. 1321-71. Seven circuit courts of appeal have considered the question of whether internal prison grievance procedures with no authority to award money damages are "available" administrative remedies that the Act requires a prisoner to exhaust before bringing a money damage action for deprivation of his civil rights. There is a conflict among those circuits as follows.

The Seventh Circuit has taken the intermediate position holding that so long as there is some administrative scheme, it must be exhausted except in cases where the

prisoner is seeking damages for a delay in medical treatment later received.

1. *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532 (7th Cir. 1999) (state prisoner action under 42 U.S.C. § 1983); *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999) (federal prisoner *Bivens* action).

The Tenth, Ninth, and Fifth Circuits have held that a prison administrative scheme that does not provide for the award of money damages is not an "available" administrative remedy for which exhaustion is required under the Prison Litigation Reform Act.

2. *Garrett v. Hawk*, 127 F.3d 1263, 1267 (10th Cir. 1997) (federal prisoner *Bivens* action); *Miller v. Menghi*, No. 99-3401, 2000 WL 639688 (10th Cir. May 18, 2000) (state prisoner action under 42 U.S.C. § 1983).

3. *Lundsford v. Jumao-As*, 139 F.3d 1233 (9th Cir. 1998) (federal prisoner *Bivens* action); *Rumbles v. Hill*, 182 F.3d 1062 (9th Cir. 1999) (state prisoner action under 42 U.S.C. § 1983).

4. *Whitley v. Hunt*, 138 F.3d 882, 886 (5th Cir. 1998) (state prisoner action under 42 U.S.C. § 1983); *Wright v. Hollingsworth*, 201 F.3d 663 (5th Cir. 2000) (state prisoner action under 42 U.S.C. § 1983; urges en banc reconsideration of *Whitley*).

The Eleventh, Sixth, and Third Circuits have held that any prison administrative scheme must be exhausted even if the prison authorities have no authority to award money damages.

5. *Alexander v. Hawk*, 159 F.3d 1321, 1327 (11th Cir. 1998) (federal prisoner *Bivens* action); *Harris v. Garner*, 190 F.3d 1279 (11th Cir. 1999) (state prisoner action under 42 U.S.C. § 1983).

6. *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998) (state prisoner action under 42 U.S.C. § 1983); *LaVista v. Beeler*, 195 F.3d 254 (6th Cir. 1999) (federal prisoner *Bivens* action).

7. *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000) (federal prisoner *Bivens* action); *Booth v. Churner*, 206 F.3d 289 (3d Cir. 2000) (state prisoner action under 42 U.S.C. § 1983).

B. The Interpretation of the Prison Litigation Reform Act Reached by the Seventh, Eleventh, Sixth, and Third Circuits Conflicts With This Court's Interpretation of the Same Federal Prison Grievance Procedure of 28 C.F.R. § 542.10 et seq. Reached in *McCarthy v. Madigan*, the Bureau of Prisons' Own Interpretation of its Authority, the Purpose of Exhaustion, and The Federal Courts' Duty to Exercise Their Jurisdiction

Resolution of this case turns on the interpretation given the Bureau of Prisons administrative grievance procedure, 28 C.F.R. § 542.10 et seq. App. 53-55. In *McCarthy v. Madigan*, 503 U.S. 140, 149, 112 S.Ct. 1081 (1992), this court was called upon to interpret the authority of the Bureau of Prisons to award money damages under the

grievance procedure of 28 C.F.R. § 542.10 et seq. in deciding whether judicial imposition of an exhaustion requirement was warranted. 503 U.S. at 144-50.[2] It held Congress in passing the housekeeping statute giving the Attorney General and the Bureau of Prisons authority to run the prisons did not intend to grant the authority to either to provide administrative awards of money damages for prisoners' *Bivens* claims. *Id.* at 149. It noted that Congress or the Executive was free to alter the grievance procedure to impose an administrative scheme that would require exhaustion. *Id.* at 156.

Nothing has changed to alter *McCarthy*'s interpretation of 28 C.F.R. § 542.10 et seq. App. 57-58. Congress has not extended the authority to award money damages administratively to the Attorney General or the Bureau of Prisons. And the Bureau of Prisons has made no material alteration to the terms of the regulation considered in *McCarthy*. 28 C.F.R. § 542.10 et seq. App. 53-55.

Indeed, the Bureau of Prisons itself has adopted a policy statement precluding consideration of prisoner's claims for money damages under the grievance procedure of 28 C.F.R. § 542.10 et seq. App. 57-58. The Bureau requires personnel who receive a grievance asserting a *Bivens* claim for money damages to deny the grievance and instruct the prisoner on the existence of a Federal Tort Claims Act remedy. BOP Program Statement 1330.13(6)(b), pp. 4-5 (proposed: December 22, 1995 effective:

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[2] The case is principally known for its holding that the predecessor statute, the Civil Rights of Institutionalized Persons Act, did not apply to federal prisoner *Bivens* actions. 503 U.S. at 150.

February 5, 1996) App. 57-58. This court grants considerable weight to an agency's interpretation of its own authority on matters it is required to administer. *Reiter v. Cooper*, 507 U.S. 258, 269, 113 S.Ct. 1213 (1993); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778 (1984).

"The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37, 92 S.Ct. 815 (1972). Those purposes are not present here. Any decision by a Bureau of Prisons official on a prisoner's money damage grievance other than denying it and referring to his Federal Tort Claims Act remedy is ultra vires. The Bureau has no authority to moot the impending judicial controversy under this court's interpretation of its enabling statutes in *McCarthy* and the Executive's own interpretation of its authority made after this court extended the invitation in *McCarthy* to impose a system of administrative remedies that would require exhaustion.

The interpretation of the Prison Litigation Reform Act to require exhaustion of grievance systems that have no authority to award money damages violates the federal courts' strict duty to exercise the jurisdiction granted them. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821, 96 S.Ct. 1236, 1248 (1976) (recognizing federal courts are obligated to exercise the jurisdiction unless strong countervailing reasons exist). Even when countervailing reasons require a federal court to abstain from the exercise of its jurisdiction, abstention is

limited to equitable and declaratory remedies and does not apply to money damage claims, which may be stayed, but not dismissed. *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 719, 116 S.Ct. 1712 (1996). This is especially true in the area of vindication of constitutional rights where this court has been vigilant in exercising its jurisdiction. *Carlson v. Green*, 446 U.S. 14, 21-23, 100 S.Ct. 1468 (1980) held the Federal Tort Claims remedy against the United States did not preempt federal courts' authority to entertain *Bivens* damage claims against individual federal officers. *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557 (1982) rejected the contention that there was any exhaustion of administrative remedies prerequisite to assertion of civil rights claim under 42 U.S.C. § 1983.

Of course, where Congress has plainly limited the court's jurisdiction, that limitation must be followed. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 115, 115, 102 S.Ct. 177 (1982) held Congress' elimination of federal jurisdiction to restrain the collection of state taxes where there was a "plain, speedy, and efficient" state remedy in the Tax Injunction Act, 28 U.S.C. § 1341, also applied to the damages remedy under 42 U.S.C. § 1983. But that is not the situation here. The Prison Litigation Reform Act contemplates federal jurisdiction where administrative remedies are not "available". Under the plain meaning of this term, a prison grievance system that has no authority to award money damages is not an "available" administrative remedy for which exhaustion is required before assertion of a money damage claim. The federal courts must hear such prisoner claims.

II.

Question No. 2

Dr. Otten's Claims

A. The Seventh Circuit's Decision Holding Dr. Otten has no Standing to Assert the Deprivation of his Inmate-Patients' Constitutional Rights Conflicts With a Series of This Court's Decisions Holding that Physicians and Attorneys Have Standing to Assert the Deprivations of the Constitutional Rights of Their Patients and Clients Whenever the Deprivation Affects the Professional Relationship

The Seventh Circuit held that Dr. Otten had no personal stake in the outcome of the systemic deprivation of inmate-patients' right to necessary medical care and had suffered no concrete injury. App. 26-28. Thus, he had no standing and did not meet Article III's requirement of a case or controversy. The court of appeals denigrated the physician's own interest in fulfilling his intimate professional duties to his patient that has been regularly recognized as sufficient to confer standing by this court.

Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868 (1976) reviewed the court's third party standing cases. It adopted a two part test for third party standing to assert the deprivation of the constitutional rights of another. (1) The relationship between the third party and the person whose rights are affected must be "inextricably bound" to the enjoyment of the third person's rights. (2) There must be some practical obstacle to the third person's ability to assert their rights. 428 U.S. at 114-16.

The court of appeals noted that unlike Dr. Otten, the physicians in *Singleton* "suffer[ed] concrete injury from

the operation of the challenged statute." App. 28 citing *Singleton*, 428 U.S. at 113. The physicians in *Singleton* complained of Medicaid restrictions on payment for abortions that denied them fees for indigent patients. 428 U.S. at 112. Dr. Otten complains of Bureau of Prisons policies restricting his ability to deliver necessary medical care to his inmate-patients, which lead to termination of his employment.

The earlier cases on which *Singleton* relied hold that the existence of an unconstitutional infringement on the patient's rights that limits the physician's practice of medicine according to his patient's needs was itself a sufficient concrete stake in the outcome to confer standing on the physician. *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965) held the interest of the physician in prescribing contraceptives to unmarried patients conferred standing to bring an action to enjoin the state statute criminally prohibiting such conduct. In *Doe v. Dolton*, 410 U.S. 179, 93 S.Ct. 739 (1973), the court held the physician's interest in providing abortions to patients who desired them conferred standing on the physician to challenge the state criminal statute prohibiting abortion.

Here Dr. Otten alleged that the Bureau of Prisons regulations prevented him from providing the necessary medical care to his inmate-patients required by the accepted standard of medical practice. He had a duty to provide such treatment under the ethics of his profession, the Eighth Amendment, and the common law expressed in the waiver of sovereign immunity of the United States in the Federal Tort Claims Act, 28 U.S.C. § 2672. 118-Count II, Part III, ¶ 21, p. 30. Dr. Otten was discharged from his employment because of his assertion of the

rights of his inmate-patients to necessary medical treatment in furtherance of these unconstitutional policies. 118-Count II, Part IV, p. 33.

Dr. Otten's interest in continued employment and properly treating his patients is stronger than the interest in providing oral contraceptives to unmarried patients who preferred that form of contraception held sufficient to convey standing in *Griswold v. Connecticut*. Dr. Otten's injury is his loss of employment. It is certainly more substantial than the fees lost by the physicians in *Griswold* and *Singleton*. Moreover, the economic loss incurred by the physicians was not a basis for the decision holding the physicians in *Griswold* had standing to assert the deprivation of their patients' rights. Dr. Otten's interest and injury also is far stronger than the interest of a seller of property subject to a racially restrictive covenant in selling to a Negro buyer as opposed to a white buyer that conveyed standing in *Barrows v. Jackson*, 346 U.S. 249, 259, 73 S.Ct. 1031, 1036 (1953). See *Singleton v. Wulff*, 428 U.S. at 115.

Dr. Otten's injury is just as significant, if not more, than the interest of the Brotherhood of Railroad FELA attorneys who this court held had standing to assert their client's rights infringed upon by Virginia's application of its ethical anti-solicitation provisions to the attorney's contact with injured union members. *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1, 8, 84 S.Ct. 1113 (1964). Dr. Otten's injury is akin to the attorneys who lost fees in a forfeiture under the Racketeer Influenced Corrupt Organizations Act. *Caplin & Drysdale v. United States*, 491 U.S. 617, 109 S.Ct. 2646 (1980) (holding attorneys had standing to assert client's Sixth Amendment rights). Dr. Otten's

injury is also akin to the attorney who lost fees due to the attorney's fees restrictions on black lung claims. *United States Dept. of Labor v. Triplett*, 494 U.S. 715, 100 S.Ct. 1428 (1990) (attorney has standing to assert his client's due process rights).

The Seventh Circuit's application of the "concrete injury" requirement of Article III to deny standing to Dr. Otten is contrary to any principled reading of this court's physician and lawyer standing cases. If the Seventh Circuit has it right, then this court had it wrong in *Barrows v. Jackson, Railroad Trainmen, Griswold, Doe v. Bolton, Singleton v. Wulff, Caplin & Drysdale,* and *United States Dept. of Labor v. Triplett.*

The second part of the test for third party standing of *Singleton v. Wulff* is that there be some practical obstacle to the third person's assertion of his own constitutional rights. Massey's difficulty in reaching the merits of his case here confirms the practical obstacles to assertion of the inmates' right to necessary medical treatment. He had no knowledge of the fact that Dr. Otten had ordered surgery on his hernia on August 7, 1997 or the fact that the surgery had been canceled by Health Services Administrator Somalia until his counsel was informed of that in the December 23, 1997 hearing before the district court. Massey was fortunate enough to have a lawyer who wrote the Warden about his hernia condition. Had the lawyer not written the Warden, there would be no basis on which to file an action for denial of necessary medical care. Few prisoners have a lawyer available to write letters to the Warden inquiring about denial of medical treatment they need.

The Seventh Circuit found the relationship between Dr. Otten and his inmate-patients did not involve the concerns over the intimate decision on abortion that justified standing in *Singleton*. But prisoners are wholly dependent on the prison physician for necessary medical care. If those physicians who insist that prison officials provide that medical care are discharged for that conduct, then the prisoner's medical care is determined by non-physicians. This itself is a systemic violation of the Eighth Amendment that will inevitably inflict cruel and unusual punishment on many prisoners. Recognition of the standing of a physician bold enough to be fired for insisting on fulfillment of his prisoner-patients' rights is just as important as it is in the abortion cases.

B. The Seventh Circuit's Decision Holding That the Inmates' Right of Access to the Courts was not Implicated by Dr. Otten's Discharge in Retaliation for his Testimony Conflicts With the Seventh Circuit's Own Test for First Amendment Retaliation Claims and Decisions of the Sixth, Eighth, and Ninth Circuits in Prisoner Cases Holding that the Injury to the First Amendment Right of Access to the Courts is Inherent in the Retaliatory Conduct Itself

The Seventh Circuit dismissed Dr. Otten's claim that his discharge deprived his inmate-patients of their First Amendment right of access to the courts because he did testify at a deposition. App. at 26-27. The special injury requirement imposed by the panel conflicts with the standard for evaluating a retaliatory discharge claim applied by another panel in *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). If the retaliatory conduct is such that it would

deter a person of ordinary firmness in the exercise of the right, a constitutional deprivation occurs. This is consistent with this court's retaliation decisions recognizing the chilling effect on speech that will occur if public employers base employment decisions on speech. *Board of County Commissioners v. Wabaunsee County, Kansas,* 518 U.S. 668, 674, 116 S.Ct. 2342 (1996) (extending public employees' protection against retaliation for speech to independent contractors).

Among the claims asserted in *Thaddeus-X v. Blatter,* 175 F.3d 378 (6th Cir. 1999) was a claim that the prison officials retaliated against the inmate-plaintiff, Bell, by disciplinary actions and cold food and the inmate-plaintiff, X, by transferring him to the mental health unit in retaliation for filing Eighth Amendment claims. 175 F.3d at 395. Defendants there – like defendants here – contended that the plaintiff inmates lacked standing to assert their retaliation claim. Indeed, the plaintiffs in *Thaddeus-X* – like Massey here – continued to litigate after the retaliation. If the Seventh Circuit decision is correct, then the Sixth Circuit should have dismissed the retaliation claims in *Thaddeus-X* with the observation that the retaliation was unsuccessful as the prisoners are still litigating.

The Sixth Circuit held the prisoners had standing to assert a claim for retaliatory conduct that affected their right of access to the courts. 175 F.3d at 394. It found that because retaliation against a prisoner strikes at the heart of his constitutional right to seek redress of grievances, *the injury to the right of access to the courts inheres in the retaliatory conduct itself.* (emphasis added). *Thaddeus-X, id.* The Eighth and Ninth Circuit have each reached the same conclusion in prisoner retaliation claims. *Thaddeus-X, id.*

citing *Dixon v. Brown*, 38 F.3d 379 (8th Cir. 1994) and *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 2339 (1998). *Thaddeus-X, Id.*

The chilling effect of the retaliatory conduct on the exercise of prisoner's rights to assert the systemic denial of necessary medical care here is readily apparent. Dr. Otten is a retired general surgeon who took the prison job to keep working after he was unable to do surgery. 118-Count II, Part I, ¶ 2, p. 21, A-1. He has the economic wherewithal to resist retaliatory discharge that career Health Services and other Bureau of Prisons personnel do not have. If defendants are allowed to fire Dr. Otten with impunity for his speech, then defendants' retaliation will have been successful. No physician's assistant, nurse, or prison guard employed at FCI-Pekin in his right mind will cooperate with this prisoner plaintiff or any other prisoner plaintiff in the future.

The interest of the United States as an employer would be served, rather than hindered by such a ruling. This is a *Bivens* action charging officers of the United States with dereliction of one of their primary duties, the provision of necessary medical care to prisoners who have no other means of obtaining it. If this is in fact occurring as plaintiffs have alleged, then the interest of the United States requires that any FCI-Pekin or Bureau of Prisons employee should be free to provide information on such misconduct so that it can be corrected. The panel's decision ensures that no FCI-Pekin prisoner will receive such cooperation in the foreseeable future.

Thaddeus-X, *Dixon*, and *Brown* cannot be dismissed with observation that those cases involved retaliatory

conduct against the prisoner himself, as opposed to the retaliation against non-defendant prison employees who are confirming the prisoner's allegations involved here. Retaliation against a favorable prison-employee witness is even more serious than retaliation against the prisoner himself. The prisoners in *Thaddeus-X*, *Dixon*, and *Brown* had the option of resisting the unconstitutional retaliation until a federal court intervened. The prisoner who suffers retaliation against a favorable prison employee-witness has no way to resist the witness retaliation or prevent its destruction of his case by the chilling effect on other prison employees with favorable evidence.

Question No. 3

Dr. Otten's Claims

The Fact That the Merit Systems Protection Board Cannot Consider, Much Less Remedy, the Systemic Deprivation of Prisoner Rights Involved Here Overcomes the "Special Factors Counselling Hesitation" That Led This Court in *Bush v. Lucas* to Refuse to Hear the First Amendment Retaliation Claims of Civil Service Employees

Dr. Otten does have civil service remedies before the Merit Systems Protection Board. 5 U.S.C. § 2301. This court held the comprehensive Congressional scheme for regulating civil service employees was a "special factor counselling hesitation" in exercising the judicial power to vindicate the deprivation of constitutional rights. *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404 (1983). But *Bush v. Lucas* also recognized the power to make that determination rested with this court. 462 U.S. at 374.

Massey and Dr. Otten complain of the systemic denial of necessary medical care that any of the 133,334 *federal prisoners* unfortunate enough to have a hernia with clinical symptoms requiring surgery will encounter. See App. 2. Prisoners with myriad other serious medical conditions will face denial of necessary care due to the provisions of the Health Services Manual allowing exceptions from policies of nontreatment to be made only by the Medical Director of the entire Bureau of Prisons. The court of appeals dismissed plaintiffs' interpretation of those regulations as "hyper-technical". App. 11. But that is precisely the interpretation that Dr. Otten encountered while employed as the FCI-Pekin physician and testified about his in deposition. 122-6.

The Merit Systems Protection Board can resolve whether Dr. Otten was terminated in retaliation for exercise of his First Amendment rights. But it cannot resolve the question of whether the policies he testified about deny federal prisoners their constitutional right to necessary medical care. Nor can the federal courts effectively remedy the systemic deprivations if Dr. Otten is not a party. Without Dr. Otten as a plaintiff, there is no basis for any judicial action on the provisions of the Health Services Manual denying necessary medical care. A damage award to Massey will leave those policies in full force and effect.

The Seventh Circuit correctly found *Bush v. Lucas*'s holding to be based on the refusal to create a substantive judicial remedy, not on a lack of subject matter jurisdiction. App. 22-23 citing *Bush*, 462 at 378. The "special factors counseling hesitation" present in *Bush* are not present here. Dr. Otten should be allowed standing to

enforce the Eighth and First Amendment rights of his inmate-patients. This is consistent with the intent of Congress in enacting the supplemental jurisdictional statute, 28 U.S.C. § 1367(a). The statute was drafted by the Federal Courts Study Committee with the express intention of overruling the restrictions on supplemental jurisdiction of *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003 (1989). Under Section 1367, the federal courts are to exercise their jurisdiction to the fullest extent allowed by Article III to avoid piecemeal litigation and resolve all claims arising out of a controversy in one forum. Wright, Miller, & Cooper, *Federal Practice and Procedure*, § 3567, p. 59 (Supp. 1998). The same concerns are present here. Those factors together with the unique ability of Dr. Otten to obtain a judicial determination of whether federal prisoners are being systematically denied necessary medical care overcome the "special factors" of *Bush v. Lucas*. The substantive remedy should be applied in favor of this federal civil service employee.

Respectfully submitted,

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Michael MASSEY and John Otten, M.D., Plaintiffs-Appellants,
v.
David HELMAN, et al., Defendants-Appellees.

No. 99-1459.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 8, 1999.

Decided Nov. 2, 1999.
As Corrected Jan. 13, 2000.

Richard L. Steagall (argued) Nicoara & Steagall, Peoria, IL, for plaintiffs-appellants.

James A. Lewis (argued), Office of the United States Attorney, Springfield, IL, for defendants-appellees.

Before POSNER, Chief Judge, and BAUER and RIPPLE, Circuit Judges.

BAUER, Circuit Judge.

Michael Massey, a prisoner at the Federal Correctional Institution in Pekin, Illinois, brought this lawsuit under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) against federal prison officials for allegedly violating his rights under the Eighth Amendment by denying him surgical care for a hernia. One of the prison's staff physicians, Dr. John Otten, M.D., recommended that Massey have the hernia surgically repaired, but after making this recommendation, was fired from his job. After being terminated, Dr. Otten joined Massey's

Bivens action and asserted one claim against the defendant prison officials arising from his discharge and two claims on behalf of inmates at the prison. The district court dismissed the lawsuit, and Massey and Dr. Otten now appeal. For the following reasons, we affirm.

BACKGROUND

At last count, the United States Department of Justice Federal Bureau of Prisons ("BOP") is incarcerating 134,344 prisoners. Federal Bureau of Prisons Weekly Population Report (last modified Oct. 22, 1999) <http://www.bop.gov/weekly.html>. While housing enough people to populate a medium-sized American city, the BOP necessarily encounters prisoners with all varieties of health and medical problems. In an effort to care for its prisoners' medical complications in an orderly manner, the BOP has enacted a Program Statement entitled the Health Services Manual. The fundamental purpose of the Health Services Manual is to efficiently regulate the provision of medical, dental, and mental health services to federal prisoners so that inmates receive necessary health care from competent staff.

To manage the delivery of medical services to BOP inmates, the Health Services Manual describes a hierarchy of prison officials who are charged with administering medical services to all federal prisoners. The top dog in this chain of command is the BOP Medical Director. The current BOP Medical Director, Dr. Kenneth Morit Sugu, M.D. ("Dr. Sugu"), is "responsible for all health care delivered by [BOP] health care practitioners and U.S. Public Health Service officers." As Medical Director, Dr.

Sugu's duties include "establishing health care programs . . . regularly inspecting institution health care facilities and programs; and coordinating research activities related to health care." In other words, Dr. Sugu oversees the general administration of all medical care to the 134,344 federal prisoners in this country.

One step down from BOP Medical Director Dr. Sugu are individuals known as Regional Health Systems Administrators ("RHSAs"). Generally speaking, RHSAs serve as advisors to BOP Regional Directors in all areas of health care. Additionally, RHSAs are responsible for developing suggestions for medical policy revisions, performing management assessments, responding to correspondence and complaints from prisoners, and providing medical advice to BOP Regional Directors regarding the planning, development and construction of new BOP institutions.

At the institutional level, each BOP facility has its own Health Services Unit which is staffed with a Clinical Director, a Health Services Administrator, staff physicians, and other paraprofessional staff. The Clinical Director bears ultimate responsibility for clinical care provided at the institution. The Clinical Director also hires all staff physicians, monitors in-house continuing professional education for physicians, maintains medical records, and evaluates patient care. The institution's Health Services Administrator plans and controls all aspects of the Health Services Unit's daily administration. In cases where an inmate needs medical treatment that cannot be provided at the institution, the Health Services Administrator arranges for "outside" medical services to

be performed at local hospitals. Finally, the Health Services Administrator also serves as the "direct avenue of communication between Health Services and the CEO, designee, Regional Office, and Central Office." Both the Clinical Director and the Health Services Administrator report directly to the Warden or Assistant Warden of the BOP facility.

In addition to establishing the hierarchy of prison officials who administer medical treatment to federal prisoners, the BOP Health Services Manual also creates health care standards to guide the provision of medical services to inmates. Specifically, the Health Services Manual defines the following four categories of medical care:

> (LEVEL 1) Medically mandatory is defined as immediate, urgent or emergency care required to maintain or treat a life threatening illness or injury.
>
> (LEVEL 2) Presently medically necessary is defined as routine care or treatment that cannot reasonably be delayed without the risk of further complication, serious deterioration, significant pain or discomfort, provided to maintain a chronic or non-life threatening condition.
>
> (LEVEL 3) Medically acceptable but not medically necessary is treatment that is not exclusively for the convenience of the patient (routine hernia repair, noncancerous skin lesions, etc.).
>
> (LEVEL 4) Exclusively for the convenience of the inmate. This level of care may include, but is not limited to, tattoo removal, minor nasal reconstruction, other cosmetic surgery, and elective circumcision.

(Emphasis in original). The BOP limits "the provision of surgical and medical procedures . . . to cases that fall within levels (1) and (2). Procedures that fall into levels (3) and (4) shall not ordinarily be provided. Exceptions must be approved by the Medical Director."

It is in the context of this BOP medical care program that plaintiffs Michael Massey ("Massey") and Dr. John Otten, M.D. ("Dr. Otten") brought this lawsuit. Massey, a prisoner at the Federal Correctional Institute in Pekin, Illinois ("FCI Pekin"), developed an abdominal hernia while incarcerated as a pretrial detainee in the Marion County, Indiana prison. Sometime after sustaining this hernia, Massey came to FCI Pekin and began serving a 70 month term of imprisonment on March 26, 1996. During his incarceration at FCI Pekin, Massey worked as a barber in the prison barber shop and contends that the standing required by his work caused his hernia to worsen to the point that it inflicted considerable pain.

Dr. Otten worked as a staff physician at FCI Pekin and examined Massey on August 5, 1996. Dr. Otten determined that Massey should undergo surgery to repair his hernia and communicated this opinion to FCI Pekin's Health Services Administrator, Ferdinand Somalia ("Somalia"). As the Health Services Administrator, it was Somalia's responsibility to arrange for the surgery to be performed at a local hospital. Nevertheless, even though Dr. Otten recommended that Massey undergo surgery, neither Somalia nor any other prison official arranged for Massey to have his hernia surgically repaired.

Because he was not receiving surgical treatment for his hernia, Massey initiated this Bivens action on November 7, 1997, both individually and as a class action. Massey claimed that FCI Pekin and the BOP administer policies that are deliberately indifferent to prisoners' medical needs and therefore violate their rights under the Eighth Amendment. Massey predicated his claims of unconstitutional medical policies on the medical care structure established by the BOP Health Services Manual. Massey complained that FCI Pekin and the BOP have unconstitutional medical policies of (1) prohibiting the surgical repair of hernias; (2) authorizing only the BOP Medical Director to approve the surgical repair of a hernia; and (3) depriving prison physicians of control over medical treatment that they order to be performed by consulting physicians. Massey and the putative class sought money damages and injunctive relief for these allegedly cruel and unusual prison policies.[1]

As Massey's lawsuit proceeded, the district court ordered Dr. Otten's deposition to be taken on January 21, 1998. However, just one day before Dr. Otten's deposition was scheduled, FCI Pekin's assistant warden, Miguel Gonzalez ("Gonzalez"), suspended Dr. Otten from his job as a staff physician and placed Dr. Otten on home duty pending a review of charges that Dr. Otten had administered inadequate medical care to inmate-patients.

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[1] Finding that he failed to satisfy the "numerosity" requirement of Federal Rule of Civil Procedure 23(a)(1), the district court denied Massey's motion for class certification on July 7, 1998.

Gonzalez then recommended that Dr. Otten's employment be terminated. This recommendation was reviewed by FCI Pekin's warden, David Helman ("Helman"), who accepted Gonzalez' recommendation and terminated Dr. Otten's employment as a staff physician at FCI Pekin on February 26, 1998.

A few weeks after being fired, Dr. Otten joined Massey's lawsuit. According to Dr. Otten, Massey's case was not the first time that he had openly protested the prison's refusal to administer medical treatment that he recommended. Dr. Otten alleged that the prison officials violated his First Amendment rights by terminating him in retaliation for speaking about a matter of public concern. In addition to his own First Amendment claim, Dr. Otten asserted two claims on behalf of his inmate-patients. Specifically, Dr. Otten charged that prison officials violated his inmate-patients' First Amendment right to have access to the courts and their Eighth Amendment right to receive medically necessary treatment.

The defendant prison officials moved to dismiss Massey's and Dr. Otten's complaint.[2] The prison officials argued that Massey could not pursue his claim because he failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act. Defendants also asserted that Dr. Otten could not maintain the claim that he was fired in retaliation for opposing the refusal of

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[2] The complaint at issue is the Fourth Amended Complaint filed in the lawsuit.

surgical care for Massey's hernia because the Civil Service Reform Act is Dr. Otten's exclusive remedy for constitutional violations related to his federal employment. Finally, defendant prison officials maintained that Dr. Otten lacked standing to assert the rights of his inmate-patients' in his remaining two claims. The district court agreed with each of defendants' arguments and dismissed the action. By the time the district court dismissed this lawsuit, Massey had received surgery for his hernia.

ANALYSIS

Because the district court dismissed this case at the pleadings stage, we review the dismissal de novo, and accept all well-pleaded allegations as true. *Kaplan v. Shure Bros., Inc.*, 153 F.3d 413, 417 (7th Cir.1998). We draw all reasonable inferences in the plaintiffs' favor, and will affirm the dismissal only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Gossmeyer v. McDonald*, 128 F.3d 481, 489 (7th Cir.1997) (quoting *Ledford v. Sullivan*, 105 F.3d 354, 356 (7th Cir.1997)). With these standards in mind, we address the issues presented for our review.

I. Massey's Eighth Amendment Claim

In Count I of the Fourth Amended Complaint, Massey alleged that the prison officials violated the Eighth Amendment's ban on cruel and unusual punishment by refusing to surgically repair his hernia. The district judge held that the Prison Litigation Reform Act ("PLRA") required Massey to first exhaust his administrative

remedies before bringing a lawsuit. Because Massey's complaint failed to allege that he had sought any administrative relief before bringing his lawsuit, the court dismissed his claim. Massey contends that the district court misconstrued the PLRA's exhaustion requirement and asks us to vacate the dismissal of his claim.

Before we reach the exhaustion issue, we must first address a jurisdictional concern raised in Massey's brief. Massey observes that the district court "noted . . . but did not resolve" the issue of whether the PLRA's exhaustion requirement is "jurisdictional" or a "threshold requirement" such as a statute of limitations. We can make short work of this jurisdictional concern simply by citing our recent decision in *Perez v. Wisconsin Department of Corrections*, 182 F.3d 532 (7th Cir.1999). In *Perez*, we held that a prisoner's failure to exhaust administrative remedies under the PLRA does not deprive federal courts of subject matter jurisdiction. *Id.* at 535. Rather, as we explained in *Perez*, so long as a prisoner has a federal claim and the failure to exhaust is not essential to the claim or the claim's ripeness, then 28 U.S.C. §§ 1331 and 1343 give the court subject matter jurisdiction. *Perez*, 182 F.3d at 535-36. In this case, Massey asserts an Eighth Amendment claim and his failure to exhaust administrative remedies is neither an essential element of his claim nor does it affect his claim's ripeness. Therefore, the district court had, and this court now has, proper federal subject matter jurisdiction over Massey's claim.[3] *See Perez*, 182 F.3d at 536.

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[3] Since we are discussing jurisdiction, it is worth noting that this court has appellate jurisdiction under 28 U.S.C. § 1291.

Having satisfied ourselves of our jurisdiction, we turn to Massey's argument that the PLRA did not require him to exhaust his administrative remedies before filing suit. The relevant section of the PLRA provides that:

> [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). Massey argues that the PLRA's exhaustion requirement does not apply to him because his lawsuit seeks money damages and there is no administrative procedure in which he can collect monetary compensation. Massey insists that money damages are the only appropriate damages because his hernia has been surgically repaired and any injunctive relief would therefore be meaningless. Thus, according to Massey, there is no administrative remedy "available" to him within the meaning of the PLRA because no administrative procedure can afford him any worthwhile relief. Massey theorizes that because there is no meaningful administrative remedy available to him, he is not required to exhaust any administrative procedures before filing a lawsuit.

Again, we need not spend much time on this argument. In *Perez v. Wisconsin Department of Corrections*, 182 F.3d 532 (7th Cir.1999), this court held that there is no futility exception to the PLRA's exhaustion requirement. *Id.* at 537. The PLRA plainly requires prisoners to exhaust "such administrative remedies as are available" before bringing a lawsuit complaining of prison conditions. 42

U.S.C. § 1997e(a). Contrary to Massey's suggestion, the PLRA does not condition the applicability of the exhaustion requirement on the effectiveness of the administrative remedy available in a given case. *See Alexander v. Hawk*, 159 F.3d 1321, 1326 (11th Cir.1998). Rather, as we noted in *Perez*, "the statutory question is whether any 'remedies' are 'available'; § 1997e(a) does not require the prison to use the prisoner's preferred remedy." *Perez*, 182 F.3d at 537. Thus, if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures.

Employing a "never say die" strategy, Massey argues that even if he had sought administrative relief before filing suit, no administrative response could have corrected the cruel and unusual punishment that he endured. In other words, in addition to being unable to provide money damages, Massey claims that no administrative complaint could have prompted prison officials to authorize the surgery he sought for his hernia. Thus, Massey argues that because no remedy was "available" for his medical condition, he did not have to exhaust the BOP's available administrative procedures.

Massey constructs his argument on a somewhat hyper-technical reading of the federal regulations that govern administrative complaints within the BOP and the BOP's Health Services Manual. Massey first points out

that the regulations which authorize administrative complaints, 28 C.F.R. §§ 542.10 – 542.19, will only direct Massey's medical concerns to the FCI Pekin staff, the BOP Regional Director, and ultimately to the BOP's General Counsel. Massey emphasizes that these administrative regulations do not explicitly require the BOP Medical Director to review complaints about inmate medical care. Massey then notes that, under the Health Services Manual, only the BOP Medical Director can authorize an exception to the Health Services Manual's general prohibition of surgical repair for hernias. Thus, Massey argues that because the regulations do not expressly require the BOP Medical Director to review every administrative appeal concerning medical care, there is no way he could have had his hernia surgery authorized by the Medical Director.

Massey's argument, while creative, misses the mark; it once again confuses the "effectiveness" of an administrative procedure with the "availability" of one. As we have already concluded, whether the administrative process actually produces a result that satisfies the inmate is not the appropriate inquiry. Instead, courts merely need to ask whether the institution has an internal administrative grievance procedure by which prisoners can lodge complaints about prison conditions. If such an administrative process is in place, then § 1997e(a) requires inmates to exhaust those procedures before bringing a prison conditions claim.

On this issue, we once again agree with the reasoning in *Alexander v. Hawk*. In *Alexander*, the Eleventh Circuit concluded that the term "available" in § 1997e(a) "is used

to acknowledge that not all prisons actually have administrative remedy programs. Some state penal institutions may not have an administrative remedy program to address prison conditions, and thus there are no 'available' administrative remedies to exhaust." *Alexander*, 159 F.3d at 1326-27. Here, as in *Alexander* and *Perez*, the BOP provides an administrative process "through which inmates may seek formal review of an issue which relates to any aspect of their confinement." 28 C.F.R. § 542.10. The BOP's administrative remedy program "applies to all inmates confined in institutions operated by the Bureau of Prisons." *Id.* The program provides for a first step of "informal resolution," 28 C.F.R. § 542.13, then appeals to the BOP Regional Director and eventually the BOP General Counsel. 28 C.F.R. § 542.15. Because Massey had this administrative procedure at his finger tips, but failed to utilize it, the district court correctly found that Massey failed to exhaust his administrative remedies under 42 U.S.C. § 1997e(a) and properly dismissed Massey's Eighth Amendment claim.

Citing dicta from our decision in *Perez*, Massey also pressed a unique theory at oral argument to escape the exhaustion requirement. In *Perez*, Judge Easterbrook gave the following hypothetical:

> [s]uppose [a] prisoner breaks his leg and claims delay in setting the bone is cruel and unusual punishment. If the injury has healed by the time suit begins, nothing other than damages could be a "remedy," and if the administrative process cannot provide compensation then there is no administrative remedy to exhaust.

Perez, 182 F.3d at 538. Massey argues that he exemplifies the imaginary prisoner in Judge Easterbrook's illustration because he has already received the surgical repair of his hernia. Massey therefore contends that, since his hernia has been repaired, only money can serve as a remedy and monetary compensation is unavailable through the BOP's administrative system. If he cannot get monetary damages from the BOP, then Massey insists that there is no administrative remedy to exhaust.

Close, but no cigar. Unlike the lame prisoner in Judge Easterbrook's hypothetical whose leg healed before he filed suit, Massey's injury did not heal "by the time suit begins." *Perez*, 182 F.3d at 538 (emphasis added). Rather, Massey's hernia was still causing him problems when he filed his lawsuit on November 7, 1997. In fact, Massey did not receive surgery until January 28, 1998, several months after he filed his lawsuit. In contrast to the imaginary prisoner in *Perez* for whom only money would serve as a remedy, Massey could have availed himself of administrative remedies that may have resulted in the surgical repair of his hernia before he filed suit. Because Massey's physical ailment lingered long past the date he filed his lawsuit, the dicta in *Perez* does not relieve him of his obligation to exhaust his administrative remedies before bringing his claim.

Before we can leave Massey's appeal behind and move on to consider Dr. Otten's claims, one more of Massey's arguments deserves attention. Massey contends that defendants waived their right to raise exhaustion of

administrative remedies as a basis for dismissal.[4] Massey premises this argument on the fact that defendants did not plead failure to exhaust administrative remedies as an affirmative defense to his Amended Complaint and Second Amended Complaint.

A prisoner's failure to exhaust administrative remedies before filing a claim constitutes an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. *See Jenkins v. Haubert*, 179 F.3d 19, 29 (2d Cir.1999); *King v. Cooke*, 26 F.3d 720, 724 (7th Cir.1994). Because failure to exhaust administrative remedies is an affirmative defense, defendants have the burden of pleading and proving the defense. *See, e.g., Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir.1997) (Title VII case noting that "failure to exhaust administrative remedies is an affirmative defense [and] the defendant bears the burden of pleading and proving that the plaintiff has failed to exhaust administrative remedies."). However, when a plaintiff files an amended complaint, the new complaint supersedes all previous complaints and controls the case from that point forward. *See Carver v. Condie*, 169 F.3d 469, 472 (7th Cir.1999). Because a plaintiff's new complaint wipes away prior pleadings, the amended complaint

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[4] Ironically, if anybody waived an argument in this case, it appears that Massey waived the right to present his waiver argument to this court. The record contains no indication that Massey ever mentioned this argument to the district court. We have repeatedly held that an argument not raised before the district court is waived on appeal. *See, e.g., Kyle v. Morton High Sch. Dist. 201*, 144 F.3d 448, 454 (7th Cir.1998); *Oates v. Discovery Zone*, 116 F.3d 1161, 1168 (7th Cir.1997).

opens the door for defendants to raise new and previously unmentioned affirmative defenses. *See Harris v. Secretary, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 343 n. 2 (D.C.Cir.1997); *see also Sidari v. Orleans County*, 174 F.R.D. 275, 283 (W.D.N.Y.1996) (filing of an amended complaint gives defendants the opportunity to assert new affirmative defenses).

Here, defendants' Answers to Massey's Amended Complaint and Second Amended Complaint did not mention Massey's failure to exhaust his administrative remedies. Defendants did, however, raise Massey's failure to exhaust his administrative remedies in their Answers to his Third and Fourth Amended Complaints. According to Massey, this was not soon enough and by failing to assert the affirmative defense earlier, defendants waived their right to raise the exhaustion issue.

We disagree. By asserting failure to exhaust administrative remedies in their Answers to Massey's Third and Fourth Amended Complaints, defendants clearly complied with Rule 8(c). Defendants' actions also provided Massey with ample notice of their intent to use that affirmative defense. *See Blonder-Tongue Labs. v. Univ. of Illinois Found.*, 402 U.S. 313, 350, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971) (the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and an opportunity to contest it). Accordingly, defendants' failure to raise exhaustion of administrative remedies in response to Massey's first few complaints did not constitute a waiver of that affirmative defense. To hold to the contrary would, in essence, enable plaintiffs to change their theory of the case while simultaneously locking defendants into

their original pleading. This result would clearly contravene Federal Rule of Civil Procedure 15(a) which authorizes the amendment of answers "as justice so requires." We therefore reject Massey's argument.[5]

II. Dr. Otten's Claims

Less than two months after being fired from his job, Dr. Otten joined Massey's lawsuit and asserted that defendants retaliated against him in violation of the First Amendment by terminating his employment at FCI Pekin because he openly opposed the medical treatment of certain prisoners.[6] In addition to his charge that prison

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[5] In any event, even if defendants had not asserted exhaustion of administrative remedies in their Answers, they adequately preserved the affirmative defense by making the argument in their motion to dismiss. This court has specifically held that defendants do not waive an affirmative defense by failing to raise it in their answer so long as they assert the affirmative defense in a subsequent motion to dismiss. *Blaney v. United States*, 34 F.3d 509, 512 (7th Cir.1994).

[6] Read liberally, the Fourth Amended Complaint also contains a claim by Dr. Otten that the prison officials violated his Eighth Amendment "right and duty" to provide adequate medical care to prisoners. *See Massey v. Helman*, 35 F.Supp.2d 1110, 1114 (C.D.Ill.1999). Dr. Otten appears, however, to have abandoned this claim on appeal. (*See* Appellants' Brief at 34.) Nevertheless, even if Dr. Otten had not abandoned this claim, it clearly lacks merit because the Eighth Amendment only applies to individuals who are being punished for violating criminal statutes. *See Ingraham v. Wright*, 430 U.S. 651, 664-71, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); *Armstrong v. Squadrito*, 152 F.3d 564, 570 (7th Cir.1998). The Eighth Amendment does not, as Dr. Otten suggests in his complaint, confer rights on employees who work in prisons.

officials violated his constitutional rights, Dr. Otten also levied two claims on behalf of inmates at FCI Pekin. Specifically, Dr. Otten said that the prison officials (1) deprived prisoners of their First Amendment right to have unimpeded access to the courts; and (2) administered medical treatment to FCI Pekin inmates that violated the Eighth Amendment. The district court dismissed Dr. Otten's First Amendment claim under *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) because the Civil Service Reform Act ("CSRA") provides Dr. Otten's exclusive remedy for an alleged constitutional violation arising out of his federal employment. *Massey v. Helman*, 35 F.Supp.2d 1110, 1115-16 (C.D.Ill.1999). As for the two claims that Dr. Otten brought on behalf of inmates at FCI Pekin, the district judge dismissed those on the basis that Dr. Otten had no standing to assert claims on behalf of prisoners. *Id.* at 1116-17.

A. Dr. Otten's First Amendment Retaliation Claim

In his appeal, Dr. Otten argues that the district court should not have dismissed his First Amendment claim under *Bush v. Lucas*. In *Bush*, a federal employee brought a First Amendment retaliation claim against the National Aeronautics and Space Administration ("NASA"). *Bush*, 462 U.S. at 369, 103 S.Ct. 2404. In both administrative and federal court proceedings, *Bush* alleged that he had been demoted because he made public statements that were critical of his supervisors and of NASA policies. *Id.* at 369-70, 103 S.Ct. 2404. The Supreme Court concluded that *Bush* could not maintain his First Amendment Bivens claim against NASA because Congress had established an

elaborate remedial scheme through which federal employees could seek redress for constitutional wrongs related to their federal employment. *Id.* at 388-90, 103 S.Ct. 2404. The Court reasoned that Congress is in a better position than courts to decide whether federal employees should have a Bivens cause of action when those federal workers have such an extensive administrative remedy available. *Id.* at 390, 103 S.Ct. 2404. The Court found that the comprehensive administrative remedy available to *Bush* constituted a "special factor" which required the Court to refrain from creating a judicially-fashioned Bivens remedy. *Id.* at 389-90, 103 S.Ct. 2404.

Our cases interpreting *Bush* make it abundantly clear that Dr. Otten has no Bivens remedy in federal court for the claimed retaliation. For example, in *Robbins v. Bentsen*, 41 F.3d 1195, 1202 (7th Cir.1994), we held that an employee of the Internal Revenue Service could not maintain a First Amendment retaliation claim because we were "clearly presented with a situation in which Congress has provided an elaborate remedial scheme, the CSRA, for the protection of . . . constitutional rights in the employment context." Similarly, in *Feit v. Ward*, 886 F.2d 848, 851-56 (7th Cir.1989) we expressly found that the CSRA's extensive remedial scheme precluded a First Amendment retaliation claim by a former employee of the United States Forest Service. In *Moon v. Phillips*, 854 F.2d 147, 150 (7th Cir.1988), we observed that "subject to narrow exceptions, a federal employee cannot file a suit for damages against his supervisor for an unconstitutional adverse personnel action when Congress has provided an adequate administrative remedy." Citing the provisions of the CSRA, we held that a federal employee

could not maintain a First Amendment retaliation claim. *Id.* at 152. Finally, in *Ellis v. United States Postal Service*, 784 F.2d 835, 839-40 (7th Cir.1986), we affirmed the dismissal of "political discrimination" claims under *Bush* because postal employees have an extensive remedy under the collective bargaining agreement established by federal law.

Here, Dr. Otten was a federal employee who could have used the CSRA to complain about the alleged retaliation which he asserted violated his First Amendment rights. As we explained in great detail in *Feit*, the CSRA creates an elaborate remedial scheme through which federal employees can seek review of allegedly unconstitutional employment actions. *See Feit*, 886 F.2d 852. Where, as in this case, Congress has fashioned such a detailed and comprehensive administrative process for federal workers to lodge complaints, " '*Bush* does not permit us to apply a separate constitutional cause of action.' " *Robbins*, 41 F.3d at 1202 (quoting *Ellis*, 784 F.2d at 840). Dr. Otten fails to offer any principled reason for this court to hold that *Bush v. Lucas* does not doom his First Amendment claim; nor has Dr. Otten even attempted to distinguish the facts of his case from our precedent concluding that the CSRA constitutes his only remedy for the alleged retaliation.

Dr. Otten does, however, creatively attempt to resurrect his First Amendment claim by emphasizing that the district court dismissed the claim for lack of subject matter jurisdiction. According to Dr. Otten, if the viability of his First Amendment claim depends on whether the court has subject matter jurisdiction, then we should reverse because the district court had supplemental jurisdiction

over his claim under 28 U.S.C. § 1367(a). Dr. Otten's novel theory begins with the premise that the district court had subject matter jurisdiction over Massey's Eighth Amendment claim. Dr. Otten then points out that his First Amendment retaliation claim is related to Massey's Eighth Amendment claim because they are both based on the same allegedly unconstitutional medical policies. Dr. Otten concludes that the trial court had supplemental jurisdiction over his First Amendment claim because it forms part of the same case or controversy as Massey's Eighth Amendment claim over which the district court had original jurisdiction. *See* 28 U.S.C. § 1367(a).

There is a fundamental flaw in this theory. Although the district court dismissed Dr. Otten's retaliation claim for lack of subject matter jurisdiction, 35 F.Supp.2d at 1116, this was not the correct basis for the dismissal. Instead, the district judge should have dismissed the claim under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Federal courts do have jurisdiction to hear a First Amendment retaliation claim by a federal employee. The Supreme Court made this clear in *Bush* by stating:

> [t]he federal courts' power to grant relief not expressly authorized by Congress is firmly established. Under 28 U.S.C. § 1331, the federal courts have jurisdiction to decide all cases "aris[ing] under the Constitution, laws, or treaties of the United States." This jurisdictional grant provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946), but

> also the authority to choose among available judicial remedies in order to vindicate constitutional rights.

Bush, 462 U.S. at 374, 103 S.Ct. 2404. It is clear that 28 U.S.C. § 1331 gives federal courts jurisdiction to hear constitutional claims such as Dr. Otten's First Amendment claim.

After declaring that federal courts have jurisdiction over such claims, the Court explained that the extent to which courts should exercise this power must be tempered by policy considerations. *Id.* at 376, 103 S.Ct. 2404. The Court summarized the interplay between jurisdiction and the responsibility to refrain from creating new causes of action by stating:

> [t]he federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.

Id. at 378, 103 S.Ct. 2404. The Supreme Court's cases have unequivocally established the "power to grant relief that is not expressly authorized by statute, but they also remind us that such power is to be exercised in light of

relevant policy determinations made by the Congress." *Id.* at 373, 103 S.Ct. 2404. Based on these competing principles, the Court concluded that Congress, not the judiciary, must decide whether " 'to create new substantive legal liability' " for federal employees who claim constitutional deprivations. *Bush*, 462 U.S. at 390, 103 S.Ct. 2404 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 302, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947)).

Bush therefore teaches that the rule precluding constitutional claims by federal employees who have adequate administrative remedies stems from the absence of substantive legal rights rather than the courts' lack of subject matter jurisdiction. These substantive rights do not exist because Congress has not created such a cause of action and the Supreme Court has recognized that courts must defer to congressional judgment on the issue. Accordingly, the appropriate basis for dismissing a Bivens claim under *Bush v. Lucas* is failure to state a claim upon which relief can be granted, not lack of subject matter jurisdiction.[7]

In this case, the district court dismissed Dr. Otten's First Amendment claim for lack of subject matter jurisdiction. In doing so, the court applied analysis which shows that Dr. Otten's First Amendment claim should have been dismissed for failure to state a claim upon which relief

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[7] This conclusion finds further support in our decisions based on *Bush*. *See Robbins*, 41 F.3d at 1196; *Feit*, 886 F.2d at 850; *Moon*, 854 F.2d at 148; *Ellis*, 784 F.2d at 837 n. 2. In each of these cases, we affirmed a district court's dismissal of a federal employee's First Amendment retaliation claim for failure to state a claim upon which relief can be granted.

can be granted. In these circumstances, "we have previously held that if remanding a case dismissed for want of subject matter jurisdiction would be futile because appellant has also failed to state a claim upon which relief can be granted, we will affirm the district court, even though the dismissal for lack of subject matter jurisdiction was improper." *Gammon v. GC Services Ltd. Partnership*, 27 F.3d 1254, 1256 (7th Cir.1994) (citing *Shockley v. Jones*, 823 F.2d 1068, 1073 (7th Cir.1987); *White v. Elrod*, 816 F.2d 1172, 1176 (7th Cir.1987)). Because the analysis employed by the district court shows that Dr. Otten's First Amendment claim was legally insufficient under Rule 12(b)(6), we affirm the dismissal of Dr. Otten's First Amendment claim.

B. Dr. Otten's Claims on Behalf of FCI Pekin Inmates

In addition to his own First Amendment claim, Dr. Otten also brought two claims on behalf of inmates at FCI Pekin. Dr. Otten alleged that the prison officials (1) deprived prisoners of their First Amendment right to have unimpeded access to the courts when they fired him; and (2) administered medical treatment to FCI Pekin inmates that violated the Eighth Amendment. Finding that Dr. Otten had no standing to assert the constitutional rights of these prisoners, the district judge dismissed both of these claims.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves

both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). When considering whether a party satisfies the constitutional requirement of standing, the court must determine that "the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.' " *Id.* (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973)). In other words, to meet the constitutional element of standing, the plaintiff must allege an actual "case or controversy" within the meaning of Article III. *Warth*, 422 U.S. at 498, 95 S.Ct. 2197.

In addition to the constitutional limitation on standing, courts also impose "prudential limitations" on the class of persons who may invoke federal jurisdiction. *Id.* Among these prudential restrictions is the general rule that a litigant must assert his own legal rights and cannot assert the legal rights of a third party. *See United States v. Raines*, 362 U.S. 17, 22-23, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960); *Tileston v. Ullman*, 318 U.S. 44, 46, 63 S.Ct. 493, 87 L.Ed. 603 (1943); *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 862 (7th Cir.1996). "This rule flows from a concern that third parties will not adequately represent the individuals whose rights they seek to vindicate." *Retired Chicago Police*, 76 F.3d at 862. The Supreme Court has, however, recognized third party standing on "rare occasions" when the plaintiff can show a sufficiently significant personal interest in the outcome of the case to satisfy Article III's case or controversy requirement. *Indemnified Capital Investments, S.A. v. R.J. O'Brien & Assocs., Inc.*, 12 F.3d 1406, 1409 (7th Cir.1993).

Thus, "[w]hen a person or entity seeks standing to advance the constitutional rights of others, we ask two questions." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 n. 3, 109 S.Ct. 2646 (1989). First, has the litigant suffered some injury in fact sufficient to create a case or controversy in the Article III sense? And second, as a prudential matter, is the plaintiff the proper proponent of the particular legal rights he is asserting? *Id.*; *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (majority opinion). When a litigant attempts to assert the rights of a third party, "the standing question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500, 95 S.Ct. 2197.

Here, Dr. Otten's third party claims allege that prison officials deprived inmates of their First Amendment right to have unimpeded access to the courts and administered medical treatment that violated the Eighth Amendment. We find that Dr. Otten has no standing to assert these claims because he does not satisfy the constitutional case or controversy requirement. Neither of these borrowed claims shows that Dr. Otten had a personal stake in the outcome of the prisoners' case. Rather, both claims pertain exclusively to the rights and interests of the inmates. Dr. Otten does not allege that his own constitutional rights or other interests correlated to or were affected by the prisoners' First and Eighth Amendment rights that he sought to assert.

Dr. Otten apparently seeks to establish that his rights were connected to the prisoners' First Amendment right

of access to the courts because his termination hampered the prisoners' ability to obtain evidence in support of any claims they may assert. This contention does not survive close scrutiny because it directly contradicts allegations in the Fourth Amended Complaint. Specifically, the complaint alleges that Dr. Otten was suspended from his job just one day before he was scheduled to give a deposition in support of Massey's claim that FCI Pekin and BOP medical policies are unconstitutional. Nevertheless, even after his suspension, Dr. Otten continued with his deposition in Massey's case and gave extensive testimony in support of Massey's Eighth Amendment claim. Dr. Otten cannot seriously contend that his termination interfered with other prisoners' access to the courts by confining their ability to gather evidence in support of their cases.

Dr. Otten also fails to show that he has a stake of constitutional magnitude in the prisoners' Eighth Amendment rights. Dr. Otten has no Eighth Amendment interest in the medical treatment the prisoners receive; rather, the medical treatment afforded (or withheld) from prisoners is an issue in which only those individual prisoners have an actionable right. As the Supreme Court has held, when a party attempts to assert the rights of another not before the court, "the standing question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500, 95 S.Ct. 2197. Here, the prisoners' rights are based in the Eighth Amendment – a constitutional provision that confers no rights on Dr. Otten. *See supra*, at note 6. Because Dr. Otten has no rights under the Eighth Amendment, he cannot possibly have a

personal stake in the outcome of the Eighth Amendment claim he seeks to advance on behalf of the inmates.

Dr. Otten relies heavily on *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) in support of his argument that he has standing to assert the rights of his inmate-patients. *Singleton* involved physicians who "suffer[ed] concrete injury from the operation of the challenged statute." *Id.* at 112-13, 96 S.Ct. 2868 (majority opinion). The doctors in *Singleton* had a pecuniary interest in their patients' case because the statute at issue precluded the doctors from collecting payment for medical abortion services they provided for their patients. *Id.* at 113, 96 S.Ct. 2868. Thus, the Supreme Court observed that "if the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions." *Id.* Under those circumstances, a majority of the Court found the parties' positions "classically adverse" and held that under those circumstances "there clearly exists between them a case or controversy in the constitutional sense." *Id.* In stark contrast, Dr. Otten has no pecuniary interest in the prisoners' medical treatment and stands to gain nothing by advocating the third party rights of inmates at FCI Pekin. Dr. Otten fails to allege the existence of a case or controversy between himself and defendants.

The lack of an Article III case or controversy is not the only reason that Dr. Otten does not have standing to assert claims on behalf of the FCI prisoners; standing is also improper in this case because prudential considerations show that Dr. Otten is not a proper individual to represent the prisoners' interests. These prudential factors require federal courts to "hesitate before resolving a

controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton*, 428 U.S. at 113, 96 S.Ct. 2868 (plurality opinion). Thus, courts recognize a general rule against allowing a litigant to seek vindication of the rights of a third party not before the court. *Id.* at 114, 96 S.Ct. 2868. When determining whether to fashion an exception to this general rule, courts consider two facts: (1) the relationship of the litigant to the person whose right he seeks to assert; and (2) the ability of the third party to assert his own right. *Singleton*, 428 U.S. at 114-116, 96 S.Ct. 2868 (plurality opinion).

Dr. Otten seeks to pursue the rights of his inmate-patients at FCI Pekin and emphasizes the doctor-patient relationship between himself and the individuals he seeks to represent. In support of his argument that he has standing to assert these third-party rights, Dr. Otten again relies on *Singleton*, where the Supreme Court recognized a physician's standing to assert the rights of a patient seeking abortion services. *See Singleton*, 428 U.S. at 118, 96 S.Ct. 2868 (plurality opinion). According to Dr. Otten, there is no difference between the physician-patient relationship in *Singleton* and the relationship between himself and the inmates at FCI Pekin whose rights he seeks to litigate. We disagree with Dr. Otten's argument that the Supreme Court painted with so broad a brush when the Court recognized the physicians' standing in *Singleton*.

At least two important facts distinguish Dr. Otten's alleged physician-patient relationship with the FCI Pekin inmates from the doctor-patient relationship at issue in *Singleton*. First and foremost, the doctors in *Singleton*

enjoyed an ongoing physician-patient relationship with their patients at the time they filed suit. Dr. Otten, on the other hand, had been fired from his job as a staff physician at FCI Pekin six weeks before he filed suit. Therefore, unlike the physicians in *Singleton*, Dr. Otten did not have doctor-patient relationship with the prisoners when he brought the lawsuit and attempted to assert third party standing. Without the existence of this relationship, Dr. Otten does not establish the "closeness" between the litigant and the third party that existed in *Singleton* and that led the Supreme Court to recognize the doctors' standing. Since he was not the prisoners' physician when he filed suit, Dr. Otten is not a proper proponent of the prisoners' rights.

Another crucial difference between this case and the physician-patient relationship in *Singleton* is the nature of the medical treatment the patients sought to receive. In *Singleton*, the patients sought to obtain abortions – a time sensitive medical decision that involves a potential human life and one which many women do not make without first obtaining counseling from their physician. The unique nature of the abortion services at issue in *Singleton* prompted the Supreme Court to remark that "the constitutionally protected abortion decision is one in which the physician is intimately involved. Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision." *Singleton*, 428 U.S. at 117, 96 S.Ct. 2868 (plurality opinion). Unlike the physicians in *Singleton*, Dr. Otten is not seeking to provide time-sensitive medical services which involve a potential human life or that require

intense counseling before deciding to administer. Rather, Dr. Otten focuses his claim on run-of-the-mill ailments for which he believes the prisoners should receive treatment. Dr. Otten fails to allege that the inmates at FCI Pekin are in need of medical treatment as unique as an abortion.

The second prudential consideration – the ability of the third party to assert his own rights – also counsels against recognizing Dr. Otten's request for standing. There is no allegation in the Fourth Amended Complaint which suggests that the inmates have any obstacle preventing them from properly asserting their own rights. Unlike *Singleton* where the Court found that the abortion patients' privacy considerations and imminent mootness of their claims interfered with their ability to pursue their own rights, Dr. Otten has alleged no such facts.[8] The complaint in this case contains no hint that the prisoners' privacy could be unconstitutionally compromised if they brought their own lawsuits. Similarly, because Dr. Otten has not identified any specific prisoners with health problems that will become moot, he fails to illustrate that imminent mootness interferes with the prisoners' ability to advocate their own rights.

CONCLUSION

For the foregoing reasons, the decision of the district court is AFFIRMED.

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[8] Whether prisoners have any privacy rights in their prison medical records and treatment appears to be an open question. *See Anderson v. Romero*, 72 F.3d 518, 522-23 (7th Cir.1995).

Michael MASSEY, and John Otten, M.D., Plaintiffs,

v.

David HELMAN, Warden of the Federal Correctional Center in Pekin, Illinois, in his individual capacity; Ferdinand Somalia, Health Services Administrator of the Federal Correctional Center in Pekin, Illinois, in his individual capacity; Miguel Gonzalez, Assistant Warden of the Federal Correctional Center in Pekin, Illinois, in his individual capacity; and Kenneth Morit Sugu, M.D., Medical Director of the Bureau of Prisons of the United States Department of Justice, in his individual and official capacity, Defendants.

No. 97-1401.

United States District Court, C.D. Illinois.

Feb. 2, 1999.

John P. Nicoara, Richard L. Steagall, Peoria, IL, John H. Bisbee, Macomb, IL, for plaintiffs.

Gerard A. Brost, Peoria, IL, James A. Lewis, Springfield, IL, for defendants.

OPINION

RICHARD MILLS, District Judge.

A prisoner and a prison doctor join together to bring this case.

It must be dismissed.

I. FACTUAL BACKGROUND

Plaintiff Michael Massey is a prisoner at the Federal Correctional Facility in Pekin, Illinois ("Pekin Facility" or "Pekin"). He contends that he did not receive proper treatment for a hernia and that this improper treatment constituted a denial of his Eighth Amendment right to receive adequate medical care. He specifically contends that three policies of the Bureau of Prisons resulted in his inadequate medical care.[1]

Plaintiff John Otten was a physician who worked at the Pekin Facility until he was discharged in February 1998. He alleges that he was discharged in furtherance of the unconstitutional policy of depriving inmates of their Eighth Amendment right to medical care and their First Amendment right of access to the courts. In addition, he claims a deprivation of his own First Amendment right to speak on matters of public concern.

II. PROCEDURAL BACKGROUND

The parties have filed a plethora of motions in this case[2], and few of the memoranda in support of those

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[1] The alleged policies are (1) policy prohibiting surgical repair of hernias; (2) policy that the medical Director is the only person who can approve a surgical hernia repair; (3) policy that prison physicians have no control over the authorization of medical treatment that they order to be performed by consulting physicians.

[2] The motions decided in this opinion include the following: Motion to Dismiss filed by Defendant; Plaintiffs' Motion for Leave to Amend Fourth Amended Complaint; Plaintiff Massey's Motion to Deny Defendants' Application for

motions have been especially helpful to the Court in terms of clear argument or complete inclusion of relevant authorities. In fact, in one of the representative types of pleadings before the Court, Plaintiff[3] Massey filed a motion to discuss additional authority in which was mentioned several cases that supported contentions in one of his earlier motions. However, he completely omitted discussion of other cases, such as the Eleventh Circuit case of *Alexander v. Hawk*, 159 F.3d 1321 (11th Cir.1998) that directly undermines his contentions. The *Alexander* case was decided more than a month before Plaintiff's motion was filed. This sort of selective presentation of authority is more than a little deceptive and is strongly discouraged by the Court.

Defendants have filed a motion to dismiss the complaint. The grounds for this motion are (1) that Mr. Massey is required to exhaust his administrative remedy before filing an action in this Court, (2) that the Court lacks jurisdiction over Dr. Otten's claims, and (3) that Dr. Otten lacks standing to bring the claims.

Plaintiffs filed their responses in two lengthy and overlapping memoranda. Their argument, in summary, is that exhaustion is not required as to Mr. Massey and that Dr. Otten's claims are not barred by any lack of jurisdiction or standing problems.

Summary Judgment or, alternatively, to Continue Hearing; Plaintiffs' Motion to Compel.

[3] Since the two plaintiffs filed some separate memoranda, they will be referred to individually as Mr. Massey and Dr. Otten. When appropriate, they will be referred to collectively as "Plaintiffs".

Perhaps on the theory that more is preferable to less, Mr. Massey also has filed a motion styled "Rule 56 Motion to Deny Defendants Application for Summary Judgment." In this motion, Mr. Massey asserts that Defendants have converted their motion to dismiss into a motion for summary judgment by including an affidavit with the motion to dismiss. Thus, he concludes, there must be additional discovery on the contested issues of fact and he must be given a further opportunity to respond. In addition, Plaintiffs have filed a motion for leave to amend his fourth amended complaint and a motion to compel.

III. ANALYSIS

A. MOTION TO DISMISS COUNT I

Defendants, in their motion to dismiss count I, contend that Mr. Massey has failed to exhaust his administrative remedies as a prerequisite to bringing this action in federal court. Defendants argue that since he has not satisfied this requirement, the action must be dismissed.

This exhaustion requirement is set out in the Prison Litigation Reform Act ("PLRA"), codified at 42 U.S.C. § 1997e(a):

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted. 42 U.S.C. § 1997e(a).

Plaintiff contends that there is no requirement of administrative exhaustion in this case because there is no

administrative remedy "available" in this case. Mr. Massey's contention is that he could not have received the relief he is seeking in this case in any administrative proceedings available to him at Pekin. Specifically, he argues that neither money damages nor an alteration in the BOP's alleged policy prohibiting surgical repair of hernias could be obtained via the administrative remedy. Thus, he concludes that no administrative remedy was "available" to him and that the PLRA therefore does not bar this action in federal court.

On the other hand, the defendants argue that the term "available" does not refer to the effectiveness of the administrative remedy. They argue that because an administrative remedy does exist for challenging prison conditions at Pekin, and because Mr. Massey has failed to use those procedures, he is barred from bringing this claim in this Court. Thus, the resolution of this issue turns on whether the term "available" means that the remedy sought in the lawsuit must be obtainable via the administrative procedures, or, instead, the term "available" means that there is some remedy in place that the prisoner could have taken advantage of, even if the potentially obtainable remedy would not be as effective in terms of the relief sought in the court action.

The Courts are divided on this issue. Some courts do not require that a prisoner who is seeking a monetary remedy exhaust her administrative remedies when the administrative remedy does not include the payment of money. *See Garrett v. Hawk,* 127 F.3d 1263 (10th Cir.1997); *Lunsford v. Jumao-As,* 139 F.3d 1233 (9th Cir.1998); *Whitley v. Hunt,* 158 F.3d 882 (5th Cir.1998). The reasoning of these courts is that if an administrative remedy does not

include an award of damages, then money damages are not "available" and hence a prisoner seeking money damages may bypass the administrative proceeding and bring an action in federal court.

Other courts, however, have recognized that the inquiry must be focused on the intent of Congress evidenced by the PLRA. The court should look first to the statutory language and then to other relevant indicia of Congress' intent to determine if exhaustion is required by the PLRA as a prerequisite to a lawsuit in federal court.

Some courts have performed this inquiry in laudable detail. For example, the Eleventh Circuit has reasoned that the phrase "administrative remedies as are available" in the PLRA does not mean that the remedy must in addition be an adequate administrative remedy. *See Alexander v. Hawk*, 159 F.3d 1321, 1327 (11th Cir.1998) (emphasis added). Several reasons are given for this conclusion.

First, one indication of Congress' intent in the PLRA is that the former version of the PLRA required "exhaustion of such plain, speedy, and effective administrative remedies as are available." 42 U.S.C. § 1997e(a)(1) (1994); *See Alexander* at 1326. As can be seen from this change in statutory language, Congress has deleted the terms "plain," "speedy," and "effective," from the statutory language. This is a good indication that Congress intended for prisoners to resort initially to administrative remedial procedures, without regard to the ultimate effectiveness of that remedial procedure in providing the specific relief requested by the prisoner. Alexander at 1326.

Also, if the Courts were required to examine carefully every case and determine whether the administrative remedies were as effective as the relief sought in the lawsuit, then Congress' purpose in enacting the PLRA would be seriously undermined. Among other things, Congress sought, in the PLRA, to reduce the load of frivolous prisoner litigation in the courts. *See id.* (citing 141 Cong.Rec. H14078-02). Congress' purpose thus could be drastically thwarted if a prisoner could simply include a request for damages in his complaint and thereby bypass the exhaustion requirement and file his claim initially in federal court.

Finally, even if an administrative remedy does not include an award of money, resort to the administrative remedial procedures would have other beneficial effects. It would, for example, allow the factual background to be developed and may result in the cessation of the allegedly offending conduct. *See Alexander* at 1327; *Funches v. Reish*, No. 97 CIV. 7611(LBS), 159 F.3d 1321, 1998 WL 695904 (S.D.N.Y. Oct. 5, 1998). These salubrious effects would follow from requiring exhaustion even in those cases where the administrative procedures do not include an award of money.

Those courts that have allowed a money damages claim to defeat the exhaustion requirement have not paid the requisite close attention to the statutory language in the current version of the PLRA, the prior version of the PLRA, or the purpose of Congress in enacting the PLRA. Thus, the Court finds that the PLRA requires exhaustion of a prisoner's claims seeking monetary damages, injunctive remedies, or both.

The exhaustion requirement has been held to be either a jurisdictional requirement or simply a threshold requirement, akin to a statute of limitations. *See, e.g. Alexander v. Hawk,* 159 F.3d 1321, 1326 (11th Cir.1998) (exhaustion is mandatory under new version of PLRA, not subject to waiver); *Wendell v. Asher,* 162 F.3d 887, 890 (5th Cir.1998) (exhaustion requirement is akin to a statute of limitations, subject only to the defense that remedy is not "available"); *Wright v. Morris,* 111 F.3d 414, 421 (6th Cir.1997) (exhaustion is not a jurisdictional requirement). The Seventh Circuit has not yet spoken to this issue nor decided whether the exhaustion requirement is jurisdictional.

In any case, Plaintiff must at least allege some facts from which the Court could infer that he has exhausted his administrative remedies in order to survive the motion to dismiss for lack of exhaustion. *See, e.g. Underwood v. Wilson,* 151 F.3d 292 (5th Cir.1998) (noting that dismissal under 42 U.S.C. § 1997e(a) is made on the pleadings alone); *Moore v. Doan,* No. 98-2307, 1998 WL 887089, *4 (N.D.Ill., Dec.10, 1998) (under notice pleading, Plaintiff need not specifically allege exhaustion, though his complaint did at least mention his administrative grievance).

Here, Defendants have attached an affidavit from Deborah A. Hickey, coordinator of Administrative Remedies at Pekin, stating that Mr. Massey has filed no complaint or grievance through the administrative remedy program regarding the matters in this lawsuit. In response, Plaintiffs have not even alleged that Mr. Massey has availed himself of this remedy, but instead focus

their attack on the speculative ultimate ineffectiveness of the administrative remedies.

Thus, it is clear that Plaintiff does not sufficiently allege in his complaint, as amended, that he has exhausted or even begun to exhaust his administrative remedies. Thus, the motion to dismiss Count I will be allowed.

B. MOTION TO DISMISS COUNT II

Though the fourth amended complaint is a rather long and jumbled document, if read generously it seems that Plaintiff Otten asserts several claims therein, two individual claims and two claims of his patient-inmates: (1) a claim based on the First Amendment right to speak freely about the alleged deprivation of medical care to inmates at Pekin; (2) a claim based on an Eighth Amendment right to avoid violations of the patient-inmates' Eighth Amendment rights to medical care; (3) a claim based on the First Amendment right of access to the courts, alleging that the inmates were denied this right by Dr. Otten's termination; (4) an Eighth Amendment claim based on the alleged unconstitutional policy and practice of inadequate medical treatment given to inmates at Pekin.

In the motion to dismiss, Defendants argue that Dr. Otten may not bring his own claims in this Court because such claims must instead be heard by the Merit Systems Protection Board pursuant to the Civil Service Reform Act. Also, Defendants argue that Dr. Otten lacks standing to pursue the claims.

1. Jurisdiction

Defendants seek to dismiss Dr. Otten's claims due to a lack of jurisdiction. They specifically argue that in the Civil Service Reform Act ("CSRA") Congress has provided a comprehensive system for handling claims, including constitutional claims, that arise out of federal employment.[4] This congressional intent shows that the CSRA, rather than a *Bivens* remedy, is the appropriate remedial channel for employment grievances such as those alleged by Dr. Otten in this case. Therefore, it is argued, resort to a *Bivens* remedy is inappropriate.

The Supreme Court has determined that Courts may not always fashion a remedy for constitutional claims; instead, the Court has deferred to the legislature to fashion appropriate remedies for constitutional violations. *See e.g., Bush v. Lucas,* 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). This hesitancy has sometimes been justified on separation of powers grounds, but it has also been noted that if the Court is to perform its functional role as protector of the Constitution, then Courts should sometimes be able to fashion remedies for Constitutional violations. *See* 68 S.Cal.L.Rev. 289, 316 (1995).

Nonetheless, following Supreme Court precedent, the Seventh Circuit has concluded that when Congress sets out a meaningful remedial scheme, courts may not supplement that scheme with a *Bivens* action. *See Feit v. Ward,* 886 F.2d 848, 853-855 (7th Cir.1989); *Moon v. Phillips,* 854 F.2d 147 (7th Cir.1988). Nor should the courts allow a

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[4] *See, e.g.* 5 U.S.C. § 1214(a)(1)(A) et seq.

Bivens action to go forward when there are "special factors" counseling hesitation. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). A particular remedial scheme may constitute a "special factor" under this analytical scheme. *See Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988) (noting that even if a remedial scheme did not afford "complete relief" it may nonetheless preclude a *Bivens* action).

In *Feit*, plaintiff, who was employed by the Forest Service, brought a *Bivens* action after he was terminated for his participation in a protest. The Seventh Circuit held that the remedial scheme provided by the Civil Service Reform Act ("CSRA") was sufficiently comprehensive to preclude resort to a *Bivens* action for damages. Since Feit was a seasonal employee, the remedies included an opportunity to file a complaint with the Office of Special Counsel ("OSC"), after which the Special Counsel is authorized to investigate the charges or direct the head of the agency to do the investigation. *See* 5 U.S.C. § 1206(b)(3)(A); Feit, at 852. The OSC may recommend corrective action to the agency and may ultimately force compliance by filing an action with the Merit Systems Protection Board ("MSPB"). *Id.*

Similarly, in *Moon*, a former employee of the IRS claimed that he was harassed by supervisors in violation of his First Amendment right of freedom of speech. Plaintiff sought damages, attorney's fees and costs. The Seventh Circuit held that Moon had to resort to the remedies available in the Merit Systems Protection Board ("MSPB"). One of the remedies included in the scheme was judicial review of the administrative decision. *See Moon* at 152; *See also Paige v. Cisneros*, 91 F.3d 40, 44 (7th

Cir.1996) (noting that consolidation of CSRA and creation of MSPB to deal with federal employee disputes "strengthens the conclusion that *Bivens* remedies have no place in individual personnel disputes arising out of federal employment.").

In this case, Dr. Otten claims that he was fired for speaking out about the treatment of prisoners, and that this termination constituted retaliation in violation of the First Amendment. He also seems to claim that he had an Eighth Amendment right to avoid violations of the inmates' Eighth Amendment rights, and that this right was violated.[5] The authorities cited above would give ample reason to require Dr. Otten to resort to his remedies available in the CSRA, but one additional issue must be decided before reaching that conclusion.

Though there is broad agreement that a money damages claim would not be allowed in the circumstances presented here, the courts are split on the issue of whether a claim for equitable relief should be denied as well. Some courts reason that the CSRA does not take away the traditional power of the courts to hear claims for equitable relief. *See Spagnola v. Mathis,* 859 F.2d 223 (D.C.Cir.1988); *Mitchum v. Hurt,* 73 F.3d 30 (3d. Cir.1995). Other courts focus on structural concerns for separation of powers and conclude that Congress' clear intent in the CSRA was to mandate that the CSRA was to be the exclusive vehicle for federal employee claims related to

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[5] Again, the fourth amended complaint is so long and overlapping that the Court has trouble determining exactly what right is being asserted. Read generously, however, this seems the best interpretation of the complaint.

federal employment. *See, e.g. Lombardi v. Small Bus. Admin.*, 889 F.2d 959, 962 (10th Cir.1989); *Stephens v. Department of Health & Human Services*, 901 F.2d 1571, 1576 (11th Cir.1990); *Also see Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir.1996) (collecting cases, but not reaching a decision on the issue).

The parties in this case, however, do not acknowledge this division on the issue of whether equitable claims are barred under *Bush* and subsequent cases. In fact, Dr. Otten simply acknowledges in his brief that his claims for individual relief arising out of his employment must be dismissed pursuant to *Bush v. Lucas*. (P1. Brief at p. 7). Even if Dr. Otten had not conceded the issue, however, the Court finds that the principle of separation of powers and proper deference to congressional intent, shown by the comprehensive remedies of the CSRA, both weigh in favor of the conclusion that a claim for equitable relief will not allow a plaintiff to bypass the CSRA and bring his claim instead in federal court.[6]

2. Standing

Defendants also argue that Dr. Otten lacks standing. Constitutional standing analysis consists of several overlapping but analytically distinct threads: injury, causation, and redressability. *See, e.g. Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297,

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[6] Plaintiff also seems to assert that jurisdiction extends to Dr. Otten's claims under 28 U.S.C. § 1367. They cite no case where such an extension has been permitted. The Court finds no merit in this argument.

2302, 124 L.Ed.2d 586 (1993). Defendant is not careful to distinguish the various aspects of standing that Dr. Otten lacks, but it seems that they primarily attack the idea that the relief requested would redress the injuries he sustained. Defendant asserts that since Dr. Otten is no longer employed at Pekin, any change in the policies or practices at Pekin would not affect him. Dr. Otten asserts, on the other hand, that a physician has standing to assert the constitutional rights of his patients.

When a defendant challenges standing via a motion to dismiss, the trial courts "must accept as true all material allegations of the complaint and must draw all reasonable inferences therefrom in favor of the plaintiff." *Retired Chicago Police Assoc. v. City of Chicago*, 76 F.3d 856, 862 (7th Cir.1996) (citing *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343, (1975); *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir.1993)).

Dr. Otten argues that a physician has standing to assert the Constitutional rights of his patients. *See Warth*, 422 U.S. at 508-10, 95 S.Ct. 2197; *Singleton v. Wulff*, 428 U.S. 106, 117-18, 96 S.Ct. 2868, 49 L.Ed.2d 826 (physicians permitted to assert patients' right to abortion where privacy considerations and imminent mootness of claim would prevent women themselves from asserting right). In *Singleton*, the Court noted that the physician is intimately involved with the patient's abortion decision. The Court also emphasized that the doctrine of imminent mootness and the need to protect the privacy of women seeking abortions worked in favor of allowing third party standing.

However, in a case very similar to the instant one, a district court refused to allow a physician standing to assert the Eighth Amendment rights of prison inmate-patients. *Carlen v. Dep't of Health Serv.*, 912 F.Supp. 35, 41-42 (E.D.N.Y.1996). In that case, a physician wished to assert the Eighth Amendment rights of the inmates to receive proper medical care. The court in *Carlen* found that the inmate-patients could assert their own rights without serious difficulty. Cases such as *Carlen* recognize that abortion is a very special context and that third party standing should not be extended to all cases where a physician seeks to assert some constitutional violation that the patients could bring themselves.

Here, Plaintiff Otten asserts that the patients face obstacles to the assertion of their rights. But the only identified obstacles are the speculative possibility of mootness, the possibility that the Pekin administrators will simply revert to their former practices, and the risk of jury hostility to inmates. But none of these concerns, even if proven, make this case unusual, and certainly do not make this case similar to the abortion cases cited above. These asserted obstacles are insufficient, as a matter of law, to allow Dr. Otten to assert the rights of the prisoners in this case.

In addition, Dr. Otten himself has been terminated from his employment and will thus not benefit from the injunctive and declaratory relief he requests for the alleged Eighth Amendment violations. Though he requests reinstatement for the First Amendment violations, the Court has already determined that he may not maintain that action because he must instead use the

remedial scheme provided in the CSRA. The only remaining relief in the amended complaint is the request for injunctive/declaratory remedies.[7] Thus, because his injuries will not be redressed by the injunctive/declaratory relief requested and because he lacks third party standing to assert the rights of the inmates, the Court concludes that Dr. Otten lacks standing to pursue his claims in this case.

C. Rule 56(f) Motion

Mr. Massey also has filed a motion styled "Rule 56(f) Motion to Deny Defendants' Application for Summary Judgment Asserted in Their Motion to Dismiss or Alternatively, to Conduct Hearing on the Application To Allow Plaintiff to Conduct Discovery." In this motion, he notes that Defendant's Motion to Dismiss included an affidavit from Ms. Deborah Hickey, Executive Assistant to the Warden of the Federal Correctional Institution in Pekin. This affidavit set out her statement that she was the coordinator of Administrative Remedies at Pekin and that Plaintiff had not requested any injunctive relief and had not exhausted the BOP's remedial procedure as set out in 28 C.F.R. § 542.10 et seq.

Mr. Massey contends that this affidavit has transformed the Motion to Dismiss into a Motion for Summary Judgment. Specifically, Mr. Massey asserts that the inclusion of the affidavit converts a Rule 12(b)(6) motion into a Motion for Summary Judgment. He believes that the

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[7] Specifically, he requests an injunction to stop the use of the allegedly unconstitutional policies and practices at Pekin.

Court must now provide for more discovery so that Plaintiff may properly respond to the motion to dismiss, now converted into a motion for summary judgment. Mr. Massey particularly wishes to propound interrogatories in order to determine the adequacy of the remedy available to him. Plaintiff further asserts that he needs more discovery to determine which party has the burden to prove the existence of administrative remedies.

Defendants' Motion to Dismiss was not denominated as a Rule 12(b)(6) motion. Defendants clearly indicated that the motion to dismiss Mr. Massey's claims was brought as a motion to dismiss for lack of exhaustion. At any rate, it is clear that the plaintiff should allege some facts sufficient to infer that he has met the exhaustion requirement in the PLRA. The sufficiency of the allegations may be decided without engaging in a factual inquiry.

Here, Plaintiff has had ample opportunity to read the relevant regulations. *See* 28 C.F.R. § 542.10 et seq. He has not alleged that he has exhausted his administrative remedies, nor has he even asserted or implied that he has begun the administrative review process. The existence of the administrative remedies is clear from 28 C.F.R. § 542.10 et seq. Instead, Plaintiff seeks to conduct a broad based inquiry into the effectiveness of the remedies provided at Pekin. However, that inquiry, as noted in the discussion above, is not relevant. It is the existence, rather than the ultimate effectiveness, of the remedial procedures that is relevant. Thus, the Rule 56(f) Motion is DENIED.

C. Motion to Amend

Plaintiffs have filed a motion to amend the fourth amended complaint in order to delete the injunctive damages claim asserted by Plaintiff Massey and assert a claim for damages. Plaintiffs also seek to amend their complaint after they have conducted further discovery.

However, "the court should not allow the plaintiff to amend his complaint when to do so would be futile." *Moore v. Indiana*, 999 F.2d 1125, 1128 (7th Cir.1993) (citing *Villa v. City of Chicago*, 924 F.2d 629, 632 (7th Cir.1991)) (citing *Foman v. Davis*, 371 U.S. 178, 183, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) and *Williams v. United States Postal Service*, 873 F.2d 1069, 1072 (7th Cir.1989)).

In light of the dismissal of both Counts of the Complaint, the proposed amendment will not cure the defects in the complaint. Even if a money damages claim were added, the exhaustion requirement would still apply, as already indicated. Thus, the Motion for Leave to Amend is denied.

IV. CONCLUSION

Mr. Massey's claims must be dismissed because he has failed to allege that he has filed or exhausted any sort of administrative grievance or availed himself of any administrative procedures as required by the PLRA. Thus, his claim in this Court must be dismissed.

Also, Dr. Otten may not bring his *Bivens* claims arising out of his employment due to the comprehensive remedial scheme provided by Congress for those claims. In addition, Dr. Otten lacks standing to pursue his claims.

Ergo, Defendants' Motion to Dismiss is ALLOWED. Count I is dismissed without prejudice for failure to allege exhaustion of administrative remedies. Count II is dismissed for lack of jurisdiction and lack of standing.

Plaintiff's Rule 56(f) Motion is DENIED. Plaintiff's Motion for Leave to Amend is DENIED. The pending motion to compel is DENIED AS MOOT.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 1, 2000

Before

Hon. RICHARD A. POSNER, *Chief Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

No. 99-1459

MICHAEL MASSEY and JOHN OTTEN, M.D.,

Plaintiffs-Appellants,

v.

DAVID HELMAN, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.

No. 97-1401

Richard Mills, *Judge.*

ORDER

On consideration of the petition for rehearing en banc filed in the above-captioned case by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny. Accordingly, it is ordered that the aforesaid petition for rehearing is DENIED.

CONSTITUTIONAL PROVISIONS, STATUTES & REGULATIONS INVOLVED

Constitution of the United States

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Prison Litigation Reform Act,
42 U.S.C. § 1997e effective April 26, 1996

UNITED STATES CODE
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 – CIVIL RIGHTS
SUBCHAPTER I-A – INSTITUTIONALIZED PERSONS

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title. . . .

. . . **(h) Definition**

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

(As amended Pub.L. 104-134, Title I, § 101 (a) [Title VIII, § 803 (d) Apr. 26. 1996, 110 Stat. 1321-71; renumbered Title I Pub.L. 104-140 § 1 (a), May 2, 1996, 110 Stat. 1327).

Bureau of Prison Regulations – Grievances,
28 C.F.R. § 542.10 *et seq*

PART 542 – ADMINISTRATIVE REMEDY
Subpart B – Administrative Remedy Program

§ 542.10 Purpose and scope.

The Administrative Remedy Program is a process through which inmates may seek formal review of an issue which relates to any aspect of their confinement, except as excluded in § 542.12, if less formal procedures have not resolved the matter. This Program applies to all inmates confined in institutions operated by the Bureau of Prisons, to inmates designated to contract Community

Corrections Centers (CCCs) under Bureau of Prisons' responsibility, and to former inmates for issues that arose during their confinement, but does not apply to inmates confined in other non-federal facilities.

§ 542.12 Excluded matters.

(a) An inmate may not use this Program to submit a Request or Appeal on behalf of another inmates. [sic] This program is intended to address concerns that are personal to the inmate making the Request or Appeal, but shall not prevent an inmate from obtaining assistance in preparing a Request or Appeal, as provided in § 542.16 of this part.

(b) Requests or Appeals will not be accepted under the Administrative Remedy Program for claims for which other administrative procedures have been established, including tort claims, Inmate Accident Compensation claims, and Freedom of Information or Privacy Act requests. Staff shall inform the inmate in writing of the appropriate administrative procedure if the Request or Appeal is not acceptable under the Administrative Remedy Program. . . .

§ 542.13 Informal resolution.

(a) *Informal resolution.* Except as provided in § 542.13(b), an inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy. Each Warden shall

establish procedures to allow for the informal resolution of inmate complaints. . . .

§ 542.14 Initial filing.

(a) *Submission.* The deadline for completion of informal resolution and submission of a formal written Administrative Remedy Request, on the appropriate form (BP-9), is 20 calendar days following the date on which the basis for the Request occurred. . . .

. . . (c) *Form.* (1) The inmate shall obtain the appropriate form from CCC staff or institution staff (ordinarily, the correctional counselor). . . .

. . . (3) The inmate shall complete the form with all requested identifying information and shall state the complaint in the space provided on the form. . . .

§ 542.15 Appeals

(a) *Submission.* An inmate who is not satisfied with the Warden's response may submit an Appeal on the appropriate form (BP-10) to the appropriate Regional Director within 20 calendar days of the date the Warden signed the response. An inmate who is not satisfied with the Regional Director's response may submit an Appeal on the appropriate form (BP-11) to the General Counsel within 30 calendar days of the date the Regional Director signed the response. . . .

. . . (3) An inmate shall complete the appropriate form with all requested identifying information and shall state the reasons for the Appeal in the space provided on the form. . . .

§ 542.16 Assistance.

(a) An inmate may obtain assistance from another inmate or from institution staff in preparing a Request or an Appeal. An inmate may also obtain assistance from outside sources, such as family members or attorneys. However, no person may submit a Request or Appeal on the inmate's behalf, and obtaining assistance will not be considered a valid reason for exceeding a time limit of submission unless the delay was caused by our staff. . . .

U.S. Department of Justice
Federal Bureau of Prisons

PROGRAM	**OPI:**	OGC
	NUMBER:	1330.13
STATEMENT	**DATE:**	December 22, 1995
	SUBJECT:	Administrative Remedy Program
	EFFECTIVE DATE:	February 5, 1996

[Relevant Portions Only]

6. *Excluded Matters* § 542.12.

[b. Requests or Appeals will not be accepted under the Administrative Remedy Program for claims for which other administrative procedures have been established, including tort claims, Inmate Accident Compensation claims, and Freedom of Information or Privacy Act requests. Staff shall inform the inmate in writing of the appropriate administrative procedure if the Request or Appeal is not acceptable under the Administrative Remedy Program.]

(1) Except as provided in subsection (3) below, this Administrative Remedy Program does not provide monetary relief. For this reason, the coordinator shall ensure that an inmate's Request or Appeal is returned when it is clear that the only possible relief is monetary. The Coordinator shall ensure that the inmate is advised that a monetary request is more appropriately submitted under the Federal Tort Claims Act (FTCA). [emphasis added].

(2) When corrective action as well as monetary relief is requested or implicated, inmates may use this Program. The response to such Requests or Appeals shall address the potential non-monetary relief, and advise the inmate that the FTCA is the appropriate procedure to seek monetary relief.

(3) Correction of inmate pay, commissary errors, and appeal of decisions on lost time wage payment are appropriate issues for this Program. See 28 CFS § 301.204 (inmate accident compensation) regarding lost time wages. Corrections of erroneous charges or credits to an inmate's telephone account and the award of refunds for telephone service problems are also appropriate issues for this Program. See the Program Statement on Telephone Regulations for Inmates regarding such recredits. [emphasis added]